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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-14 Misc.

ROBERT BURRELL, *Petitioner,*
v.
MILTON McCRAY, *Respondent.*

SERGEANT V. D. SMITH, ETC., *Petitioner,*
v.
MILTON McCRAY, *Respondent.*

GERALD McCLELLAN, ET AL., *Petitioners,*
v.
JAMES E. X. STOKES, *Respondent.*

DR. HAROLD M. BOSLOW AND
DR. DOMINGO C. SORONGON, *Petitioners,*
v.
JOHN WASHINGTON, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE
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Petitioners pray that a Writ of Certiorari issue to review the Opinion and Judgment of the United States Court of Appeals for the Fourth Circuit entered in the above cases on April 10, 1975.

OPINIONS BELOW

The Opinion and Judgment of the United States Court of Appeals for the Fourth Circuit, as yet unreported, appears in the Appendix at pages 72a-107a. The Opinion of the United States District Court for the District of Maryland in *McCray v. Burrell* and *McCray v. Smith*, 367 F. Supp. 1191 (D. Md. 1973), appears in the Appendix at pages 1a-58a. The Opinion of the United States District Court for the District of Maryland in *Washington v. Boslow*, 375 F. Supp. 1298 (D. Md. 1974), appears in the Appendix at pages 58a-69a. The Opinion of the United States District Court for the District of Maryland in *Stokes v. McClellan* appears in the Appendix at pages 69a-71a.

JURISDICTION

The Opinion and Judgment of the United States Court of Appeals for the Fourth Circuit was entered on April 10, 1975. See Appendix at page 73a. This Petition for Writ of Certiorari was filed less than ninety days from the date aforesaid and the jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Fourth Circuit erred when it held that exhaustion of State administrative remedies was not required in an action brought pursuant to 42 U.S.C. § 1983.

2. Whether the United States Court of Appeals for the Fourth Circuit erred when it reversed the judgments of the District Court in *McCray v. Burrell*, #74-1042 and

McCray v. Smith, 74-1043, based on a finding that Respondent McCray's Eighth and Fourteenth Amendment rights were violated under the circumstances of those cases and remanded for determinations on the merits.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are the Eighth and Fourteenth Amendments to the Constitution of the United States. The statutory provisions involved are 42 U.S.C. § 1983 and Article 41, Section 204F, Annotated Code of Maryland. The statutes and relevant constitutional provisions appear in the Appendix at pages 108a-113a.

STATEMENT OF THE CASE

The complaints in these cases invoked the jurisdiction of the United States District Court for the District of Maryland pursuant to 28 U.S.C. § 1343(3) and (4), 42 U.S.C. § 1983 and the Constitution of the United States.

Respondent McCray sought relief pursuant to 42 U.S.C. § 1983 for deprivations of liberty without due process of law and for imposition of cruel and unusual punishment arising out of two separate incidents in which he was allegedly placed naked in an isolation cell for 48 hours as a result of allegedly disruptive and emotionally unstable behavior on his part. The United States District Court for the District of Maryland in *McCray v. Burrell*, 367 F. Supp. 1191 (D. Md. 1973), found no constitutional violations on the part of Petitioners Burrell and Smith and further found that they had acted in accordance with standard operating

procedures which were not violative of Respondent's civil rights. The United States District Court further found that Respondent was required to exhaust his State administrative remedies provided in Article 41, Section 204F, Annotated Code of Maryland.

Respondent Stokes filed a pro se complaint pursuant to 42 U.S.C. § 1983 alleging that prison officials had violated his First and Fourteenth Amendment rights by denying him access to political newspapers. The United States District Court, on the Motion of Petitioner McClellan herein, dismissed the case for failure to exhaust State administrative remedies.

Respondent Washington filed a pro se complaint pursuant to 42 U.S.C. § 1983 alleging injuries and violations of his constitutional rights as a result of the failure of a prison doctor to provide him with necessary medical care. The United States District Court summarily dismissed the complaint for failure to exhaust State administrative remedies which the District Court found to provide fair and adequate redress for the Petitioner.

McCray v. Burrell, McCray v. Smith and *Stokes v. McClellan* were consolidated for purposes of appeal and the same were heard before a three-judge panel of the United States Court of Appeals for the Fourth Circuit on June 6, 1974. Following argument, the United States Court of Appeals for the Fourth Circuit, by Order dated June 27, 1974, consolidated *Washington v. Boslow* with the above three cases and the same were heard *en banc* before the United States Court of Appeals for the Fourth Circuit on October 1, 1974.

On April 10, 1975, the United States Court of Appeals for the Fourth Circuit held that exhaustion of State administrative remedies was not required prior to invoking Federal jurisdiction, thus reversing all of the

judgments below and remanded the cases of Respondents Stokes and Washington for determination on the merits and remanded the cases of Respondent McCray for further proceedings in accordance with their finding that Respondent McCray was denied his rights under the Eighth and Fourteenth Amendments to the United States Constitution.

Reasons for Granting the Writ

ARGUMENT I

THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT ERRED WHEN IT HELD THAT EXHAUSTION OF STATE ADMINISTRATIVE REMEDIES WAS NOT REQUIRED IN AN ACTION BROUGHT PURSUANT TO 42 U.S.C. § 1983.

This case focuses on the growing and ever more pressing problem of prisoners civil rights petitions that has swelled the federal court dockets in recent years. In fiscal year 1966, 218 civil rights complaints were filed by prisoners in the United States Courts nationwide. In contrast, the same figure has grown to 5,236 cases in the fiscal year 1974. During the first half of the fiscal year 1975, 3,019 prisoner petitions were filed nationwide. *Semi-Annual Report of the Director of the Administrative Office of the United States Courts*, (1975), at p. 19. In the District Courts of the Fourth Circuit alone, 604 petitions pursuant to 42 U.S.C. § 1983 have already been filed by prisoners during the first half of fiscal 1975. Ibid., at p. A-11.[1] An increasing number of these cases have and will continue to find their way to this Honorable Court. The number of truly

[1] This figure compares significantly with 69 petitions filed in the First Circuit, 251 petitions in the Second Circuit, 248 petitions in the Third Circuit, 717 petitions in the Fifth Circuit, 633 petitions in the Sixth Circuit, 513 petitions in the Seventh Circuit, 286 petitions in the Eighth Circuit, 563 petitions in the Ninth Circuit, 199 petitions in the Tenth Circuit, and 22 petitions in the District of Columbia.

meritorious petitions among these is notably quite small. As Chief Judge Northrop remarked in his opinion in *McCray v. Burrell*, 367 F. Supp. 1191, 1206 (D. Md. 1973), (App. 27a), ". . . it seems a misallocation of resources to impose the burden of sifting through the mass of these petitions on federal judges, let alone on Supreme Court Justices. Moreover — and this is at least as important — these overburdened judges and Justices, charged with so many other highly important functions, are less likely to give full and careful attention to each petition than officials whose special task it might be to do so." Thus, not only do prisoner civil rights petitions increase the already overburdened case load of federal judges, but their substantial volume is, in fact, counter-productive to the meritorious prisoner suits. Access to the federal courts is only illusory when a prisoner's complaint receives the summary or even long delayed consideration that a federal judge must necessarily give under the circumstances. The better solution would be to require initial resort to State administrative remedies to screen out those claims which are spurious or frivolous, thus providing needed relief for judicial case loads as well as insuring a more effective, prompt, and thorough consideration of individual petitions via an inmate grievance procedure. In addition to limiting those cases to be heard by the federal courts to those of constitutional dimension, a prior administrative hearing will provide the federal courts with a complete record of such proceedings, and thereby facilitate the role of the federal judiciary once jurisdiction is properly invoked.

Maryland now has in operation a viable and effective inmate grievance procedure which provides for a prompt and fair hearing of grievances and complaints. See *State of Maryland v. McCray*, 267 Md. 111, 144

(1972). By Chapter 210, Acts of 1971, effective July 1, 1971, and codified as Article 41, Section 204F, Annotated Code of Maryland, the Inmate Grievance Commission was established as a separate agency within the Department of Public Safety and Correctional Services and began operation on November 30, 1971, following the appointment of an Executive Director.

The Commission consists of five members appointed by the Governor, two of whom are lawyers, two of whom are "persons of knowledge and experience in one or more of the fields under the jurisdiction of the Department of Public Safety and Correctional Services", and one of whom is a member of the public at large. Article 41, Section 204F(a). At present, the members of the Commission include:

> James G. Boss — Chairman — attorney at law;
>
> James V. Bennett — attorney at law — nationally known penologist and retired Director of the Federal Bureau of Prisons;
>
> Maceo M. Williams — a former correctional officer at Patuxent Institution and probation officer for Baltimore City who is now an official of Baltimore's Concentrated Employment Program, an anti-poverty program;
>
> Edgar A. Fulton — a retired insurance salesman who is now an industrial relations consultant to the United States Bureau of Prisons, and a member of the Maryland Advisory Board for Corrections, Parole and Probation;
>
> Ralph S. Falconer — retired from the Maryland Department of Parole and Probation. See *McCray, supra*, 267 F. Supp. at p. 1202, (App. 19a).

Any person confined in a penal institution or a patient at Patuxent Institution who "has any grievance or complaint against any officials or employees of the

Division of Correction or Patuxent Institution . . ." may submit such grievance to the Inmate Grievance Commission. Article 41, Section 204F(d) (hereinafter referred to as §). The Commission is given original administrative jurisdiction over all grievances. Preliminarily, each grievance is screened by the Executive Director and a complaint may be dismissed if it "is determined to be on its face wholly lacking in merit . . ." or where the Commission obviously lacks jurisdiction. § (c). The order of dismissal is forwarded to the complainant and constitutes a final order for purposes of judicial review. If a complaint is not dismissed, withdrawn or informally resolved, the Commission must hold a prompt hearing. § (f). At least three Commissioners must be present for each hearing and decisions are made by a majority of those Commissioners. A voice-writer record is made of all hearings and is transcribed if judicial review is sought. The decision is issued in the form of an order containing findings of fact, conclusions of law and the disposition of the complaint. § (f). A complaint may be dismissed at this point if "wholly lacking in merit". Such order of dismissal is a final order for judicial review.

If a complaint is found to be meritorious, the Commission notifies the Secretary of the Department of Public Safety and Correctional Services who may either (1) affirm the decision or (2) reverse or modify it if he disagrees with the findings and conclusions of the Commission. The Secretary then may order the appropriate official of the institution to accept in whole or in part the recommendations of the Commission or take whatever action he deems appropriate in light of the Commission's findings. § (f)(2). The Secretary's order is final for the purposes of judicial review.

The Commission is empowered to require by subpoena the production of documents by the person or institution under investigation and it may also require the attendance of witnesses and the production of relevant evidence by those witnesses. § (g). An inmate has the right to appear in person, to call witnesses on his behalf subject only to the right of the Commission to limit the number or testimony of the witnesses based on relevance and materiality. Furthermore, the inmate is given the right to cross-examine all witnesses. If an inmate requests counsel, he may be permitted such representation at his own expense and may also utilize the services of an inmate representative or other outside representative. The aforementioned rights of the inmate "shall not be unreasonably withheld or restricted by the Commission." § (h).

Upon entry of a final order, the inmate may initiate judicial review of the Orders of the Commission and the Secretary in the Circuit Court of the County or city where he is incarcerated. § (1). Such review is restricted to the record and limited to a determination of whether there was any deprivation of rights secured by the federal or state constitutions or laws.

As the District Court found, ". . . there is a viable alternative to direct federal judicial intervention in the State correctional process via § 1983." *McCray, supra,* 367 F. Supp. at p. 1204, (App. 24a). Where there exists a complete and self-executing administrative process such as that present in the Inmate Grievance Commission, which can resolve complaints justly and promptly, the interest of both the courts and the inmates would be better served by requiring exhaustion of the administrative remedies.

Not only has Maryland instituted a fair and expedient procedure for handling inmate grievances, but numerous other states as well have established procedural mechanisms for prisoner complaints. The State of North Carolina, for example, has created an inmate grievance procedure substantially similar to that of the State of Maryland.[2] Other programs, while dissimilar to procedure in Maryland, clearly evidence a trend toward resolving prisoner grievances on the state administrative level as an alternative to seeking relief through the federal court system.[3]

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[2] Under Article 11, General Statutes of North Carolina, §§ 148-101-113, North Carolina has established a five-member Inmate Grievance Commission, which conducts hearings on those complaints found to be meritorious. The statute also provides for review of the Commission's decision by the Secretary of Correction and eventually by the state courts. At the hearings, the inmate has the right to be present, cross-examine witnesses, and be represented by an employee of the Department of Correction.

[3] A. The State of Florida has established an inmate grievance procedure under Inmate Treatment Directive No. 31(7-1-74), issued pursuant to Florida Statutes, Chap. 944.09. Grievances are formally submitted to the Assistant Superintendent within thirty days of their occurrence. He then either handles it personally or orders an investigation. Institution officials have thirty days within which to respond to the inmate. If the grievance is not resolved, the inmate may appeal to the Director, who has thirty days to make a response. Records are to be kept of all grievances, responses and appeals.

B. In Georgia, inmate grievance procedures are authorized in the Georgia Code Ann., § 125-1-2-14. The mechanics of the statute are outlined in a memorandum from the Commissioner of Corrections to all state institutions dated December 2, 1974. The grievance is first submitted to the Deputy Warden/Superintendent to review and investigate. He may hold a private conference with the inmate to discuss a solution to the problem. Appeal to the Warden/Superintendent is the next step. Then, if the inmate is still dissatisfied, he may appeal to the Regional Director within

Following an extensive hearing in *McCray v. Burrell*, 367 F. Supp.) *supra*, Chief Judge Northrop found that

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five days. The Regional Director has thirty days to respond and route the grievance back to the Deputy Warden/Superintendent for possible conferences. Finally, the inmate may appeal to the Commissioner and subsequently to the state courts.

C. Virginia's inmate grievance procedure was implemented in September, 1973 (revised November, 1974), by the Department of Correction for its own use. A prisoner first files his grievance with the officer in charge of the institution. After an investigation and hearing, if necessary, the Superintendent has eight days to respond to the inmate. An appeal then lies to the Deputy Director of Corrections who has fifteen days to reach a decision. A hearing or investigation may be conducted if necessary. The decision of the Director is final.

D. In New Mexico, an inmate must submit his grievance to grievance officers who then refer the same to case workers. A case worker has five days to respond and the inmate may appeal to the three-member grievance committee which has ten days within which to act. Finally, appeal lies to the Corrections Commission which must act at its next regularly scheduled meeting, provided the grievance is submitted at least five days prior thereto. Records of findings and actions taken are kept at each level.

E. An inmate in Idaho may seek review of decision of the Adjustment Committee (punitive) or Classification Committee (administrative classification) by the Chief of Habilitation within three days. Next, he may appeal to the Warden, who has five days to respond, and then to the Director of Correction, who has ten days to render a decision. Finally, the inmate may appeal to the Board of Correction which will review the case at its next meeting (about six times yearly). Idaho's program is administrative with no supporting legislation.

F. Missouri's inmate grievance procedure is outlined in a memorandum from the Department of Corrections to all state institutions dated June 28, 1974, Bulletin No. 55. An inmate is given thirty days to file his complaint with the Director of the Division, who will refer it to the Director of Program Services or Support Services, who then has fifteen days to investigate the case and prepare a report. If it is not resolved there, the matter is referred to the Director, who may appoint

the jurisdiction of the Inmate Grievance Commission ". . . mirrors the traditional areas of § 1983 jurisdiction

a panel of three to consider the problem. If an inmate is still dissatisfied, the matter is submitted within three days to the Director. If not referred to a panel at -the outset, the Director has thirty days to render a decision.

G. Louisiana has a purely voluntary grievance procedure not established by statute.

H. Arkansas has recently established a grievance procedure consisting of several administrative review officers and an appellate procedure within the institution.

I. Pursuant to Illinois Revised Statute, Chap. 38, 1003-8-8 the Director of the Illinois Department of Corrections is required to "establish procedures to review grievances of committed persons." Regulation No. 45 of the Administrative Regulations implements the statutory directive. It establishes a system whereby the inmate first files with the personnel in the institution where he is confined. Then the matter is reviewed by the institutional inquiry board, which meets weekly and where the inmate may appear. A written report of its findings must be filed within ten days. These findings are then reviewed by the Chief Administrative Officer of the institution where the grievance arose. That officer has five days to render a decision and an appeal lies to the Assistant Director of the Adult Division of the Department of Correction and to the Director of the Department, who may affirm or refer the matter to the Administrative Review Board. Ultimate findings and recommendations are to be embodied in reports filed with the Director and Assistant Director, subject to their final determination.

J. New Jersey, while without enabling legislation for an inmate grievance procedure, does have an Ombudsman who examines complaints of state prison inmates.

K. Minnesota also has an Ombudsman for corrections and a staff inmate counsel at the state prison. The office of Ombudsman was created by Minnesota Statutes, § 241.41 (1974) Laws of Minnesota, 1973, Chap. 553, § 5. He has the power to investigate complaints, order persons to appear, give testimony and produce documents, and bring actions in the appropriate state court. He may receive complaints about actions of any administrative agency or on his own motion, initiate and investigation such an action. After investigation, he makes recommendations to the agency. His conclusions and suggestions may be published by transmitting them to the office of the Governor.

in prisoner cases." *McCray, supra,* 367 F. Supp. at pp. 1202, 1208 (App. 19a-20a, 30a-32a). The District Court

L. Hawaii has a state Ombudsman who is selected by the legislature. The program operates on a state-wide level.

M. Oregon has a similar program to that of Hawaii except that the Ombudsman is appointed by the Governor.

N. Ohio and South Carolina likewise have statewide Ombudsman programs.

O. Connecticut's Ombudsman is selected by a private, nonprofit agency and functions independently of the agency that he monitors.

P. In Iowa, the Omsbudsman is an investigator for the Citizens Aide and is selected by the legislature. Like Connecticut's Ombudsman, Iowa's version comtemplates that the Ombudsman will function independently of the agency under investigation.

Q. In Wisconsin, inmates may refer their complaints to the Warden who may convene a staff inmate commission to consider the complaints and make recommendations. There is also an Assistant Attorney General who functions as a specially appointed investigator who reviews the complaints.

R. The California Youth Authority inmates and staff members drew up a procedure where the first level hearing consists of presentation of complaints, investigation and resolution. Final review is conducted by a tri-party panel comprised of a member appointed by the complainant, a member appointed by the correctional administration and a chair-person who is a professional volunteer arbitrator recruited by the American Arbitration Association.

S. In four states, inmate unions have sought recognition as bargaining agents (New York, Michigan, Massachusetts and Connecticut). Two states, Massachusetts and Rhode Island, have recognized unions there and negotiate with them.

T. The New Hampshire State Prison in Concord, New Hampshire, has had in effect since May, 1973 an inmate grievance procedure. Annually, the members of the general prison population elect approximately eighteen "shop representatives". They, in turn, appoint five spokesmen who meet with the Warden on a bi-weekly basis and, when necessary, with the Deputy Warden or Chief Custodial Officer. The meeting agenda encompass a full range of topics; of central concern is the presentation, discussion and attempted resolution of inmate grievances.

further found that the Inmate Grievance Commission also had those equity powers exercised by the federal courts and the power to entertain class actions, grant injunctive relief, consider administrative matters and recommend changes in policies. The only power which the Inmate Grievance Commission lacked was the power to award money damages, although it was held to have the power to award restitution of or payment for property improperly taken. *McCray, supra*, 367 F. Supp. at pp. 1208-1209, (App. 30a-35a). The District Court also observed that the ". . . . powers of the Commission can, in most cases, be exercised considerably more quickly to remedy offensive patterns of official conduct that can the powers of the federal courts"; that the practical enforceability of orders is greater when the person passing the order has the power to discipline and fire and that the average time from the filing of a complaint to a decision was not excessive. *McCray, supra*, 367 F. Supp. at p. 1195, 1209, (App. 5a-7a, 33a-35a). In summary, the District Court found that while the Inmate Grievance Commission did not have the power to award money damages, per se, this did not make the Inmate Grievance Commission an ineffective remedy and stated in summary:

> "However, the only thing which the imposition of this exhaustion requirement would do in these cases is to work a *postponement* of the ultimate award of damages in a meritorious § 1983 suit. . . . Of course, upon exhaustion of the State remedy, an inmate, in a proper case, may still call upon the equity power of the federal court if the exercise thereof is needed in a particular case. If, of course, the remedy of damages is needed to make a prisoner whole again in a particular case, that remedy will likewise be available to the prisoner after he has exhausted the state administrative procedure. . . . Unlike the situation with respect to injunctive or other equity-type relief, there is no

> sense of immediacy attendant upon the awarding of money damages to redress particular deprivations of constitutional rights. . . . At any rate, it is clear that whatever postponement of the right to money damages under § 1983 is worked because of the imposition of an exhaustion requirement does not amount to a deprivation of the ultimate right to such relief in theory, nor is it a deprivation in practical effect. This is true because an award of money does not require the immediate attention which ought to be given to demands for equitable relief, which in fact is given under Maryland procedure. The key point is that the ultimate right to damages is preserved during the complainant's pursuit of his state administrative remedies, and is not destroyed by a requirement that he resort to these remedies before bringing his federal action under § 1983.
>
> "Therefore, this Court concludes that before it will exercise jurisdiction over a prisoner § 1983 complaint, the inmate must exhaust the available state administrative remedy provided by the Maryland Inmate Grievance Commission procedure. Even if the complaint seeks only monetary damages, this avenue of relief should be exhausted. The claim for monetary damages is inextricably tied to prison regulations and disciplinary procedures. The Maryland Inmate Grievance Commission provides a forum with built-in judicial review which can more expertly sort out the meritorious from the frivolous." *McCray, supra*, at pp. 1208-1210, (App. 30a-35a).

See also *Hyde v. Fitzberger*, 365 F. Supp. 1021 (D. Md. 1973) and *Washington v. Boslow*, 375 F. Supp. 1298 (D. Md. 1974), (App. 58a et seq.).

In light of its decision, the Fourth Circuit did not rule on the adequacy of the administrative remedy. (App. 84a). However, Circuit Judge Widener in his separate opinion stated:

> "To this date, the Court has not been faced with a fact situation similar to the one at hand, that is to say, with a state statute providing an administrative remedy which, if not entirely adequate, is so nearly so that the deferral of only a small part of the relief sought would not impinge on the rights of the plaintiff in any significant manner." *McCray, supra,* ___ F.2d at p. ___, (App. 106a-107a).

In its opinion, the Fourth Circuit held that under *Monroe v. Pape,* 365 U.S. 167 (1961); *McNesse v. Board of Education,* 373 U.S. 668 (1963); *Damico v. California,* 389 U.S. 416 (1967) (per curiam); *Houghton v. Shafer,* 392 U.S. 639 (1968) (per curiam); *Wilwording v. Swenson,* 404 U.S. 249 (1971) (per curiam); *Carter v. Stanton,* 405 U.S. 669 (1972) (per curiam); *Metcalf v. Swank,* 406 U.S. 914 (1972) (mem. op.); *Steffel v. Thompson,* 415 U.S. 472 (1974); and *Preiser v. Rodriguez,* 411 U.S. 475 (1973), exhaustion of state administrative remedies was not required in a suit filed pursuant to 42 U.S.C. § 1983.

In *Monroe, supra,* this Honorable Court stated that the primary purposes of 42 U.S.C. § 1983 were to override certain state laws; provide a remedy where state law was inadequate and to provide a federal remedy where a state remedy, though adequate in theory, was unavailable in practice. *Monroe, supra,* at pp. 173-174.

This Honorable Court then stated that as the federal remedy was supplementary to any provided by the state, a complainant need not first seek the state remedy. *Monroe, supra,* at p. 183. *Monroe,* however, dealt with state judicial and not administrative remedies. Justice Frankfurter, in his dissent, would not have barred exhaustion of state remedies. *Monroe, supra,* at p. 237.[4]

Although *McNeese, supra,* dealt with an administrative procedure, this Honorable Court clearly held that the remedy was not adequate and the protections too tenuous to require resort to them. *McNeese, supra,* at pp. 675-676. In *Damico, supra,* this Honorable Court relied on *Monroe, supra,* and *McNeese, supra,* without discussing the adequacy of the State administrative remedy. Justice Harlan, in his dissent, took issue with the principle that there could never be resort to an adequate administrative remedy. *Damico, supra,* at p. 419.[5] *Houghton, supra,* also noted the probable futility of having a state prisoner resort to administrative remedies. *Houghton, supra,* at p. 252.

Finally, in *Wilwording, supra,* this Honorable Court, while apparently reaffirming the non-exhaustion doctrine in § 1983 cases, inserted the usual reference to the probable futility of those remedies although the remedies requiring exhaustion in *Wilwording* appear to have been state court remedies. *Wilwording, supra,* at pp. 250-252. See also the separate opinion of Judge Widener in *McCray, supra,* ___ F.2d ___, (App. 104a-

[4] In *Egner v. Texas City Independent School District,* 338 F. Supp. 931 (S.D. Tex. 1972), that Court construed the word "supplementary" not as being "supersessive" or "subsuming" but as being a reiteration of the third statutory purpose of § 1983, that of providing a federal remedy when the state remedy, theoretically available, was in practice illusory. *Egner, supra,* at pp. 934-935.

[5] In *Armsden v. Cataldo,* 315 F. Supp. 129, 131 (D. Mass. 1970), that Court again reiterated that in *Monroe, supra,* and *McNeese, supra,* that the available State remedies could not afford actual relief to the plaintiffs and the factual basis of those cases strongly suggested racial discrimination. *Houghton, supra,* involved an inadequate and illusory remedy and *Damico* restated *Monroe* and *McNeese* without discussion or analysis.

105a). Similar sentiments regarding the apparent exhaustion requirement were voiced in *Kochie v. Norton*, 343 F. Supp. 956 (D. Conn, 1972), where that Court stated that the main holding of *Damico, supra; Houghton, supra;* and *Wilwording, supra,* was that state court remedies need not be exhausted and, further, that "[N]o decision of the Supreme Court squarely holds that the complaint of a state prisoner, which, if well-founded, is capable of prompt and complete redress by an administrative official, can be brought directly into a federal district court under § 1983 without any attempt at exhaustion of administrative remedies." *Kochie, supra,* at pp. 959-960.

While the Fourth Circuit felt that *Preiser v. Rodriguez*, 411 U.S. 475 (1973), is significant for what it did not say rather than for what it did say, the Fourth Circuit stated that this Honorable Court had the opportunity in that case to impose exhaustion and failed to do so. *McCray, supra,* ___ F.2d ___, (App. 79a-80a). While it is true in *Preiser, supra,* that this Honorable Court failed to impose an exhaustion requirement, it is clear that that failure was based on other considerations and this Honorable Court was not presented with an adequate state administrative remedy. Further, the discussion by this Honorable Court in *Preiser* regarding conditions of confinement and federal state comity shows clearly that those conditions are more applicable to civil rights suits than those presented in habeas corpus actions. *Preiser, supra,* 411 U.S. at p. ___, 93 S. Ct. at pp. 1837-1838. See also *McCray, supra,* 367 F. Supp. at p. 1198, (App. 11a-13a).

In *Gibson v. Berryhill*, 411 U.S. 564 (1973), this Honorable Court seemed to indicate that in certain instances, exhaustion of administrative remedies would be required, but found that the administrative remedies

in *Gibson* were so defective and inadequate that they denied Plaintiffs due process of law. Recent cases have left the question of exhaustion of § 1983 actions unresolved. In *Procunier v. Martinez,* ___ U.S. ___, 94 S. Ct. 1800 (1974), Justice Powell stated that the ". . . problems of prisons in America are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree. . . . [C]ourts are ill-equipped to deal with the increasingly urgent problems of prison administration and reform.[9] Judicial recognition of that fact reflects no more than a healthy sense of realism." *Procunier, supra,* 94 S. Ct. at p. 1807. [Footnote by the Court]. In footnote 9 to the Opinion in that case, Justice Powell recognized that the courts were ill equipped to act as front line agencies to resolve prisoner grievances and noted suggestions for instituting internal administrative procedures. *Procunier, supra,* 94 S. Ct. at p. 1807. In *Wolff v. McDonnell,* ___ U.S. ___, 94 S. Ct. 2963 (1974), this Honorable Court, while not discussing the question of exhaustion in § 1983 cases, did formulate a distinction between due process rights afforded those incarcerated and those in free society. *Wolff, supra,* 94 S. Ct. at p. 2977. See also the separate opinion of Judge Widener in *McCray, supra,* ___ F.2d ___, (App. 105a).

Finally, in *Huffman v. Pursue,* ___ U.S. ___, 95 S. Ct. 1200 (1975), this Honorable Court held that in certain circumstances, an individual would be required to exhaust his state appellate remedies before seeking relief in District Court unless he could bring himself within an exception specified in *Younger v. Harris,* 401 U.S. 37 (1971). "The importance of the ruling [Huffman v. Pursue] is that it shows definitely that the all embracing rule of non-exhaustion in all § 1983 cases is no longer the law, for this, and the holding in *Wolfe,* are

direct holdings that, first, prisoners' rights are special cases, and, second, exhaustion may be required in some circumstances although the basis of the suit is under 42 U.S.C. § 1983." *McCray, supra,* ___ F.2d ___, (App. 106a, separate opinion of Judge Widener).

The Fourth Circuit recognized that as each of the cases presented the same question of exceptional importance, they were consolidated and heard *en banc*. *McCray, supra,* ___ F.2d ___, (App. 74a). While recognizing that the District Court in *Washington v. Boslow, supra,* had found the Inmate Grievance Commission Act a fair and adequate remedy, notwithstanding the inability of the Commission to award damages in an appropriate case, the Fourth Circuit held that, under the law, it could not require exhaustion.

> "We keenly appreciate the force of the factors identified by the District Court in *McCray* and *Washington* as supporting a policy determination that exhaustion of available administrative remedies should be required of prisoners of correctional institutions in Maryland as a prerequisite to a suit under § 1983. We recognize the burden which the increasing flood of prisoner complaint litigation places upon the already over-taxed District Courts as well as ourselves. Nevertheless, we are constrained to conclude that the holding that exhaustion is required may be reached only by either legislation conditioning resort to 42 U.S.C. § 1983 upon the exhaustion of available administrative remedies, or by the Supreme Court's re-examination and modification of its controlling adjudications on the subject. Congress has not enacted such legislation. The Supreme Court has not yet begun a re-examination of its previous holdings and we have no basis on which to predict that it will, or, if so, with what result. We think

> that we have no alternative but to hold that exhaustion may not be required." *McCray, supra,* ___ F.2d ___, (App. 75a-76a).

The Fourth Circuit further stated that ". . . it is inappropriate to consider the policy considerations which might dictate a different course of decision. They must be addressed to the Supreme Court, which alone can overrule its prior decisions, or to the Congress, which has authority to amend the statute. Our duty is clear: We must follow the Supreme Court, not attempt to lead it. We must hold that exhaustion is not required." *McCray, supra,* ___ F.2d ___, (App. 83a). Circuit Judge Field, in his separate opinion, felt that he, too, had no alternative but to hold that exhaustion would not be required in a civil rights action. ___ F.2d ___, (App. 97a-98a). In his separate opinion, Judge Widener, while concurring in the result of the majority solely because of part II of *Wilwording v. Swenson, supra,* stated that:

> "There is assuredly no policy reason for the courts not to apply the customary and general law of requiring exhaustion of administrative remedies merely because a case is brought under 42 U.S.C. § 1983. . . . Since no policy reason exists against exhaustion and protecting the liberty interests as shown by the decisions of the Supreme Court, I can find no policy interests which exist against an exhaustion requirement respecting conditions of confinement. If exhaustion is required to test the legality of the fact of confinement, what policy should require non-exhaustion when testing the conditions of confinement?
>
> "It follows that I would affirm other than on account of that part of part II of *Wilwording* which has not been modified." ___ F.2d ___, (App. 106a-107a).

Circuit Judge Russell joined in Judge Widener's separate opinion.

To deny review of the decision below of the United States Court of Appeals for the Fourth Circuit — that exhaustion of state administrative remedies is not a prerequisite to federal intervention under §1983 — would be to undermine the various reform measures that the states have undertaken to date. Furthermore, it would effectively stifle hopes of future programs to ameliorate prisoner grievances through state mechanisms. Clearly, it is more beneficial to the inmate complainant to have his problem resolved at the outset or within a relatively short time thereafter, as most of the aforementioned state grievance procedures contemplate, than to wait long months until the federal courts process his claim. Settlement of the issue presented here by this Honorable Court is, therefore, plainly in the public interest and in the interest of innumerable prisoners incarcerated nationwide.

The distinguishing feature of this case, absent from all prior litigation, was clearly pointed out by Chief Judge Northrop when he stated:

> "As previously pointed out, this Court does not think that anything in the prior trend of decisions prohibits this action, although, in all candor, the cases would not seem to encourage it. But those were different cases dealing with different facts, with administrative remedies almost neolithic compared to the Maryland Inmate Grievance Procedure." *McCray, supra,* 367 F. Supp. at p. 1207, (App. 30a).

II.

THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT ERRED WHEN IT REVERSED THE JUDGMENTS OF THE DISTRICT COURT IN *McCRAY v. BURRELL*, #74-1042 AND *McCRAY v. SMITH*, #74-1043 BASED ON A FINDING THAT RESPONDENT McCRAY'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED UNDER THE CIRCUMSTANCES OF THOSE CASES AND REMANDED FOR DETERMINATIONS ON THE MERITS.

The Fourth Circuit clearly erred in *McCray v. Burrell,* No. 74-1042, and *McCray v. Smith,* No. 74-1043, when it held that McCray's consitutional rights have been violated *per se* by his confinement in isolated cells for limited periods of time. The Fourth Circuit held in *McCray v. Smith,* No. 74-1043, that while the conditions of confinement *per se* did not amount to a denial of his rights, the failure to notify a psychiatrist/psychologist pursuant to a Maryland Penitentiary administrative directive may have amounted to such a denial. In *McCray v. Burrell,* No. 74-1042, the Fourth Circuit found two constitutional violations, that is, the conditions of confinement in the mental observation cell and the failure to comply with the administrative directive to contact the psychiatrist/psychologist. See *McCray v. Burrell,* ___ F.2d ___, (App. 90a-92a). In its Opinion, the Fourth Circuit acknowledged the extensive findings of fact made by the District Court which resolved questions of credibility and accepted those findings. They also accepted the District Court's findings that respondent's confinement in isolated cells was not intended as punishment but was for mental observation and as a precaution against a real fear that Respondent would harm himself. *McCray, supra,* ___ F.2d ___, (App. 84a, 87a-88a).

On appeal from the finding of a trial court in a non-jury action, the findings of fact of the trial court will not be set aside unless clearly erroneous and due regard will be given to the opportunity of the trial court to judge the credibility of the witnesses. Rule 52, Federal Rules of Civil Procedure; *B's Co., Inc. v. B. P. Barber and Assoc., Inc.*, 391 F.2d 130, 132 (4th Cir. 1968) and *Agee v. Hickman*, 490 F.2d 210 (8th Cir. 1974). Further, the decision and judgment of the trial court will not be disturbed on appeal if it is supported by substantial evidence and if the same is not erroneous as a matter of law. *Hellman v. Colonial Insurance Co.*, 475 F.2d 1061 (9th Cir. 1973), *B's Co., supra*, at p. 138. See also the separate opinion of Judge Widener, ___ F.2d ___, (App. 103a).

While not stating directly that the District Court's application of the facts to the law was clearly erroneous, it is apparent that the decision of the Fourth Circuit on the merits of these two cases rested on its finding that it did not like isolated confinement rather than on a finding that the Eighth Amendment prohibits such isolated confinement. Judge Field, in his separate opinion, in which Judge Russell joined also construed the majority opinion in this manner. Preliminarily, Judge Field noted that the majority bolstered its opinion by seizing ". . . upon an institutional directive which stated that 'an inmate who is displaying mentally disturbed behavior may be placed in an isolation cell for the inmate's own safety, or that of the

inmate population, until the psychologist/psychiatrist is notified * * *' . . . [T]his somewhat novel constitutional pronouncement utterly ignores the finding of the District Judge that the *principal* reason for McCray's isolation was to insulate the other inmates of the South Wing from the potentially dangerous and disruptive consequences of McCray's outrageous and flagrant misconduct, including what the District Judge found was his attempt 'to burn his cell and possibly the entire South Wing. . . .' The fact is, however, he required no such medical attention, and I am unaware of any consitutional principle which requires or justifies the incorporation of such an institutional directive into the Bill of Rights." *McCray, supra*, ___ F.2d ___, (App. 100a-102a).

As Judge Field noted, this was not a case dealing with an arbitrary or pervasive pattern of conduct as in *Landman v. Royster*, 354 F. Supp. 1032 (E.D.Va. 1073); *Landman v. Royster*, 333 F. Supp. 621 (E.D.Va. 1971), or to prolonged confinement in "strip cells" as in *Wright v. McMann*, 387 F.2d 519 (1967); nor was there an attempt at arbitrary punishment as in *Howard v. Smyth*, 365 F.2d 428 (4th Cir. 1966). See *McCray, supra*, ___ F.2d ___, (App. 101a-102a).

Without a finding that the District Court was clearly erroneous, the decision of the United States Court of Appeals for the Fourth Circuit on the merits of these two cases is clear error.

CONCLUSION

For the reasons stated, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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APPENDIX

Milton McCray
v.
Robert Burrell

Milton McCray
v.
Sergeant V. D. Smith[1] *(Badge No. 153)*

Civ. A. Nos. 72-68-N, 72-234-N

United States District Court, D. Maryland

October 16, 1973

[*367 F. Supp. 1191 (D. Md., 1973)*]

Charles F. Morgan, Legal Aid Bureau, Inc., Baltimore, Md., for Plaintiff.

Francis B. Burch, Atty. Gen. of Md., and John P. Stafford, Jr., Gilbert Rosenthal and Donald R. Stutman, Asst. Attys. Gen., for defendants.

NORTHROP, Chief Judge.

I.
MOTION TO DISMISS

The plaintiff in these cases is an inmate of the Maryland Penitentiary. He has filed these cases

[1] Defendant's correct name is Bernard D. Smith.

alleging various deprivations and improprieties in the actions taken against him by the defendants, which he seeks to have this Court adjudicate under 42 U.S.C. § 1983. The captioned cases were consolidated for trial with two other suits, Milton McCray v. John O. Rutherford, Civ. No. 70-1409-N, and Milton McCray v. Warden, Maryland Penitentiary, Civ. No. 72-69-N. The former case was decided in a separate opinion, and the latter was voluntarily dismissed by the plaintiff before the commencement of trial.

In a joint motion the defendants have moved to dismiss the complaint on the grounds that Chapter 210, Laws of Maryland, 1971, established an Inmate Grievance Commission, whose duties are to investigate and correct grievances asserted by individuals incarcerated in penal institutions in the State of Maryland. The defendants contend that this unique procedure, which permits a full hearing and subsequent judicial review, requires the plaintiff to exhaust these available state administrative remedies.

The problems of scheduling necessitated that the Court hear arguments on the motion immediately prior to the commencement of trial. Such problems are inherent to any prisoner action against a penal institution because of the security risks which arise in transporting a prisoner to the Court.

In Chapter 210 of the Laws of Maryland, 1971, the General Assembly took a giant step toward putting its houses of correction in order. Chapter 210 establishes an Inmate Grievance Commission as an arm of the Department of Public Safety and Correctional Services. Although the detailed workings of the Commission and its procedures will be explored at great length *infra*, the purpose of the establishment of the Commission is to afford Maryland prisoners an administrative forum which, after hearing the merits of prisoner complaints and grievances, is empowered to work within the bureaucracy of the correctional system to remedy affronts to the rights which prisoners are constitutionally entitled to enjoy during the period of their

confinement. The creation and implementation of this Commission constitutes the creation of a state administrative remedy to the jurisdiction of which this Court should defer consideration of prisoner petitions brought in this Court under the provisions of 42 U.S.C. § 1983 and its companion statutes. The pertinent authority interpreting § 1983, when itself interpreted in light of a practical and reasonable judicial approach, does not prevent such a conclusion.

No one intimate with the workings of the United States District Court for the District of Maryland need be reminded of the toll which the meteoric rise in the number of prisoner petitions filed in recent years has taken upon the already heavily taxed resources of this Court. Both the Clerk's Office and the chambers of the Judges of this Court are laboring under the weight of a mound of which never seems to decrease, no matter how rapidly the pending cases are adjudicated.

A look at the Annual Report of the Director of the Administrative Office of the United States Courts for the fiscal year ending June 30, 1972 and the Semi-annual Report of the Director for the first half of fiscal 1973, lend statistical evidence to our conviction that there is little hope of relief from the swelling ranks of petitioning prisoners. At the appellate level, nearly 31% of the prisoner appeals filed nationwide were filed in the United States Court of Appeals for the Fourth Circuit in fiscal 1972. This percentage rose to 36.1% during the first half of 1973. More importantly, prisoner cases accounted for 38% of all cases filed with the Fourth Circuit in 1972, and for 45.3% for the first part of 1973.

Of greater moment for our purposes is the number of civil rights petitions filed by prisoners in the United States District Courts. In fiscal 1972, 252 civil rights petitions were filed by federal prisoners (an increase of 1,580% over 1961, and an increase of 17.8% over 1971), and 3,348 were filed by state prisoners (an increase of 1,435.8% over 1961, and an increase of 14.9% over 1971). During the first half of fiscal 1973, 155 civil rights

actions were instituted by federal prisoners, and 1,891 were filed by state prisoners.

Although it cannot be denied that direct federal judicial intervention has, in recent years, served to remedy the worst examples of retrogressive American penology (as in the infamous Tucker Farm of Arkansas, *see* Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968)), the time has come to take a careful and critical look at the continued validity of the sweeping interpretation which has caused § 1983 to be read as a mandate to federal courts and forces them to accept all but the most patently ridiculous complaints from state prisoners, no matter how hard or how successfully the state has tried to set its own prison house in order.

An example of how the breadth of the interpretation of § 1983 has led to excessive federal judicial concern over state prisoners is presented by the litigation filed by the plaintiff in this case, Milton McCray. Since January, 1970, Mr. McCray has filed thirty-six suits with this Court, and, as Appendix A indicates, the number of prisoner petitions he files are increasing with the passage of time. The plaintiff's desire to litigate even the most outrageous complaint is illustrated by Milton McCray v. Warden, Maryland Penitentiary, Civil No. 72-69-N. In this case, which the plaintiff voluntarily dismissed at the commencement of this trial, he alleged that Officer Burrell, and other officers of the penitentiary unknown to the plaintiff, entered the plaintiff's cell on December 16, 1971, and broke open his locker. They then took from the locker twenty-three (23) pornographic books, two hundred and seventy-five dollars ($275), and ninety-five (95) packs of cigarettes, and a substantial number of other personal items.

In his complaint, which is attached to this opinion as Appendix B, plaintiff stated that he and Officer Burrell were engaged in what could best be described as a "Rent-a-Dirty-Book" enterprise. Apparently McCray was receiving between fifteen and twenty dollars a week renting these books to the other inmates. He would rent the "literature" to an inmate for two to five

packs of cigarettes a night. He would then sell the cigarettes to other inmates at the discount price of four packs for a dollar.

This operation falls into the classification of the enterprises alluded to by Russell Kirk in his column which appeared in The Sun on Wednesday, June 27, 1973. In that article entitled "Jailhouse Lawyers: Latest Racket Behind Bars," Mr. Kirk discussed the revelations of a new book by Fred T. Wilkinson and Fred DeArmond, "The Realities of Crime and Punishment: A Prison Administrator's Testament." It was pointed out that prison racketeers ". . . use power to mistreat their fellows or to extort money from them." Obviously, this is what McCray was doing in this instance.

While this complaint was eventually dismissed, it was not until a substantial amount of time had been expended by his attorneys, the Maryland Attorney General's Office and this Court. After this case had been consolidated with three other suits filed by the plaintiff, Michael Millemann, then counsel for the plaintiff, and the Assistant Attorney General representing the Warden, filed a Stipulation For Dismissal of this action, dated June 20, 1972. However, in a letter received by the Court from the plaintiff he asserted his desire that this action not be dismissed. As a result the case remained open, and preparations for trial continued. At the trial the plaintiff, through his counsel, Charles F. Morgan, requested that the Court grant him leave to dismiss this suit without prejudice. He stated that he had decided to pursue his available administrative remedy through the Maryland Inmate Grievance Commission, but if he was dissatisfied with the final disposition of the case, that he intended to refile the complaint in this Court.

A potential abuse of the right to bring action in federal court under § 1983 has thus been realized, with two adverse results. First, the caseload of all the judges has increased tremendously, causing a rising backlog of cases. Secondly, and more importantly, the length of time that elapses from the date a prisoner files a

meritorious claim asserting an infringement of his constitutionally protected rights to the date of disposition, has become so great that often neither equitable nor legal relief are effective in protecting his rights. This latter consequence is due in part to the ever-increasing caseload of the courts, and to some extent is a normal reaction to prisoners who have "cried wolf" many times too often. These factors cause the great concern, and a brief analysis of the magnitude of the problem is warranted.

Recently, this Court held an evidentiary hearing in Mitchell v. Boslow, Civil No. 70-675-N (D.C. Md. 1973), which involved a claim that Patuxent Institution violated the plaintiff's constitutional rights when it failed to protect him from an assault by another inmate. In order to insure that Mr. Mitchell was able to adequately present his case, it was necessary for this Court to request that a local attorney donate his time and represent the plaintiff. After plaintiff's counsel had prepared the case it was necessary to hold a conference with him, the Assistant Attorneys General handling the case for the State of Maryland, and the United States Marshal, to set up security precautions for the hearing. This was necessitated by the desire of the plaintiff to call as witnesses at the hearing seven inmates in the Maryland Correctional System who were incarcerated in three different institutions.

The *Mitchell* hearing lasted three days, March 12—March 14, 1973, with the Court finding that the plaintiff's claim was lacking in merit. During the course of the hearing it was shown that three of the five inmates who actually testified were not even confined with the plaintiff at the time of the assault. In addition, the Court noted that the attitude of one of the witnesses was: ". . . belligerent, his demeanor disrespectful. His recitation amounted to a verbal attack upon the Institution as a whole." Mitchell v. Boslow, Civil Action No. 70-675 (D.C. Md., filed March 30, 1973).

It is clear from these events that when the federal courts act as the initial forum for any prisoner who

alleges a deprivation of his constitutional rights, an allegation often totally without merit, a tremendous amount of court time is required to dispose of the action. If the length of time required for each evidentiary hearing is presumed to be the same as in the *Mitchell* case, and many could quite possibly be much longer when plaintiff is not represented by counsel, it would require forty-two days of trial to dispose of the fourteen § 1983 suits that Milton McCray instituted in this Court in the calendar year 1972. If one does not take into account the time required for pretrial motions and conferences, and the time needed to write and issue an opinion, this one prisoner has occupied a judge's time for 20-25% of the fiscal year. One must be cognizant of the fact that a prisoner civil rights action rarely is disposed of by settlement or voluntary dismissal.

In addition, since the court cannot travel to the prison itself to conduct the trials, added expense is incurred transporting the plaintiff, his witnesses and the prison personnel to the courthouse. Once this financial hurdle has been cleared, security dangers created by a large number of prisoners confined in the courthouse at one time must be confronted.

This Court is not implying that all prisoner civil rights suits are without merit, or that penal institutions in this or any other, state are without sin. But it is suggesting that these suits will continue to consume more and more of the federal courts' time, with the result that it will take longer and longer to provide relief for those prisoners who are actually being deprived of their rights. Thus, it is imperative that the scope of § 1983 be examined, and that the viability of alternative state remedies be evaluated to determine if they can provide a speedier redress of prisoner grievances while providing them the protection of due process of the laws.

The statute which is the cornerstone of virtually all prisoner petitions filed in the District Courts was enacted as § 1 of the Civil Rights Act of 1871, 17 Stat.

13. It is now codified as § 1983 of Title 42 of the United States Code and provides:

> Every person who, under the color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

For a considerable time after its passage, this statute received the narrowest of constructions. *See, e. g.,* Hemsley v. Myers, 45 F. 283 (C.C.D. Kan. 1891). However, with the growing march of incorporation of Bill of Rights guarantees into the fourteenth amendment and the concomitant growth in litigative vindication of civil rights, especially where state-created or state-sanctioned racial discrimination was at issue, it was inevitable that the language of § 1983 would eventually receive a broad interpretation. Thus, in Monroe v. Pape, 365 U.S. 167, 81 S. Ct. 473, 5 L. Ed. 2d 492 (1961), the Court opened the door to a flood of civil rights litigation by holding that, in essence, § 1983 extended to a plaintiff deprived of his constitutional rights by anyone acting, albeit unlawfully, under color of state law, a federal right to relief fully supplementary to any right of relief available for the same unlawful deprivation in state courts. Said Mr. Justice Douglas for the majority:

> It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked. [*Id.* at 183, 81 S. Ct. at 482].

Perhaps the fact that the plaintiff in *Monroe* set forth allegations of the most outrageous police conduct imaginable upon him and his family solely because of his membership in the Negro race, spurred the Court on

to its statement that § 1983 was intended to afford a remedy fully supplementary to any existing (and presumably adequate) remedy of which plaintiff could avail himself in state court. It is pointed out in an extremely well-reasoned Note entitled "Limiting the Section 1983 Action in the Wake of Monroe v. Pape" at 82 Harv. L. Rev. 1486 (1969) that the fact situation in *Monroe,* outrageous to the civilized man as it may be, fell within none of the three "main aims" of § 1983 articulated by Mr. Justice Douglas, these being; (1) overriding certain kinds of state laws; (2) providing a remedy *when state law is inadequate;* and (3) providing a remedy when the state law is adequate in theory *but not in practice. Id.* at 1489.

In the wake of *Monroe* there followed two cases involving racial discrimination. In McNeese v. Board of Education, 373 U.S. 668, 83 S. Ct. 1433, 10 L. Ed. 2d 622 (1963), the Court determined that a federal action could be maintained under §1983 despite the plaintiffs' failure to pursue available state remedy that provided both court and administrative action. The refusal to require the plaintiffs to exhaust the state court remedy was merely a reassertion of *Monroe,* but the administrative aspect of the state remedy was not required because of its inadequacy under the circumstances. Significantly, the Court pointed out that the pertinent administrative official "has no power to order corrective action." *Id.* at 675, 83 S. Ct. at 1437. The only method of enforcement at his disposal was through the state courts. Four years later, in Damico v. California, 389 U.S. 416, 88 S. Ct. 526, 19 L. Ed. 2d 647 (1967), in a brief per curiam opinion, the Court refused to deny the plaintiffs their right to bring action in federal court because they failed to exhaust a state administrative remedy. In basing its opinion on both *Monroe* and *McNeese,* the Court said of the latter, "we held that 'relief under the Civil Rights Act may not be defeated because relief was not first sought under state law which provided [an administrative] remedy,' *id.,* 373 U.S. at 671, 83 S. Ct. at 1435." (brackets original). The page reference cited a portion of the decision in which the Court rejected the requirement

of exhausting state court remedies. As Judge Newman pointed out in Kochie v. Norton, 343 F. Supp. 956 (D. Conn. 1972):

> Even if the interpolation of the word "administrative" was warranted, it could at most refer to the type of administrative remedy rejected in the latter portion of the *McNeese* opinion — namely, a remedy which is either beyond the power of the administrator or which cannot provide adequate protection to the right allegedly impaired. [*Id.* at 959].

The Court then took the word "administrative" out of brackets in Houghton v. Shafer, 392 U.S. 639, 88 S. Ct. 2119, 20 L. Ed. 2d 1319 (1968). In a brief and unenlightening *per curiam* opinion the Court held that exhaustion of only administrative remedies would not be required of a § 1983 prisoner-plaintiff where the state Attorney General, the officer to whom ultimate administrative appeal was to be taken, had already indicated his prejudgment of the case, thereby making resort to the administrative remedy an exercise in futility. But the *per curiam* opinion then added that in any event under the authority of Monroe v. Pape, resort to these remedies is unnecessary. *Id.* at 640, 88 S. Ct. 2119. Then in Wilwording v. Swenson, 404 U.S. 249, 92 S. Ct. 407, 30 L. Ed. 2d 418 (1971), the Court stated:

> . . . State prisoners are not held to any stricter standard of exhaustion than other civil rights plaintiffs. Houghton v. Shafer, [cite omitted]. There an inmate's challenge to the confiscation of his legal materials without first seeking administrative redress was sustained. Although the probable futility of such administrative appeals was noted, we held that in "any event, resort to these remedies is unnecessary." [citations omitted]. *Id.* at 251-252, 92 S. Ct. at 409.

This summary treatment of the difficult question of administrative exhaustion by the Court in § 1983 suits

led to the writing of eight separate opinions by the United States Court of Appeals for the Second Circuit in Rodriguez v. McGinnis, 456 F.2d 79 (2d Cir. 1972). This case involved a prisoner suit under § 1983 against the prison officials for loss of good behavior time credit.

Under the laws of New York a prisoner serving an indeterminate sentence may elect to participate in a conditional release program by which he can earn up to 10 days per month good behavior time credit toward the reduction of his maximum sentence. Under the program, accrued good behavior credits can be withdrawn at any time, in whole or in part, for bad behavior or violation of institutional rules. Rodriguez had elected to participate in this program but he was charged with possession of contraband material in his cell. As a result, Rodriguez had a substantial amount of credit cancelled, and in addition, he was placed in segregation. He filed suit in the district court pursuant to § 1983, combined with a writ of habeas corpus. The district court ruled that § 1983 was a proper basis for this suit, and that the habeas corpus claim was merely an adjunct to insure full relief if the plaintiff prevailed in the dominant civil rights suit. On appeal the Court of Appeals reversed, stating that this was really a petition for habeas corpus, and as such, the petitioner was required to exhaust available state remedies. On rehearing *en banc* the Court affirmed the district court on the basis of Wilwording v. Swenson, 404 U.S. 249, 92 S. Ct. 407, 30 L. Ed. 2d 418 (1971). Finally, the Supreme Court ruled that the suit was challenging the validity of fact or length of confinement, and that as such habeas corpus was the appropriate remedy. The Court stated that "a § 1983 action is a proper remedy for a state prisoner who is making a constitutional challenge to the conditions of his prison life, but not to the fact or length of his custody." Preiser v. Rodriguez, 411 U.S. 475, 93 S. Ct. 1827 at 1841, 36 L. Ed. 2d 439 (1973). While affirming its decisions in *Wilwording* and *Houghton* the Court again failed to discuss the question of exhaustion of available administrative state remedies

under § 1983. However, the Court did discuss the basis for applying the rule of exhaustion in federal habeas corpus actions. The Court, in discussing the rule as rooted in federal-state comity said:

> It is difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons. The relationship of state prisoners and the state officers who supervise their confinement is far more intimate than that of a State and a private citizen. For state prisoners, eating, sleeping, dressing, washing, working, and playing are all done under the watchful eye of the State, and so the possibilities for litigation under the Fourteenth Amendment are boundless. What for a private citizen would be a dispute with his landlord, with his employer, with his tailor, with his neighbor, or with his banker becomes, for the prisoner, a dispute with the State. Since these internal problems of state prisons involve issues so peculiarly within state authority and expertise, the States have an important interest in not being bypassed in the correction of those problems. Moreover, because most potential litigation involving state prisoners arises on a day-to-day basis, it is most efficiently and properly handled by the state administrative bodies and state courts, which are, for the most part, familiar with the grievances of state prisoners and in a better physical and practical position to deal with those grievances. In New York, for example, state judges sit on a regular basis at all but one of the State's correctional facilities, and thus inmates may present their grievances to a court at the place of their confinement, where the relevant records are available and where potential witnesses are located. The strong considerations of comity that require giving a state court system that has convicted a defendant the first opportunity to correct its own errors thus also require giving the States the first opportunity to correct the errors made in the internal administration of their prisons. [411 U.S. 475, 93 S. Ct. at 1837-1838. (footnotes omitted)].

However, the Court enphasized that even when exhaustion is required, it is contingent on the adequacy and availability of the prisoner's state remedy.

There is a need to reconsider the applicability of the exhaustion rule with respect to § 1983 actions when there is an available and adequate state administrative remedy. This is evident when one reads the eight separate opinions issued by the *en banc* panel of the Second Circuit in the *Rodriguez* case which reflect a vast disagreement in interpreting the line of cases from *Monroe* to *Wilwording*. In addition to resolving a conflict in interpretation, a reconsideration is necessary to eliminate the contradiction created by the Supreme Court in its analysis of the exhaustion rule in the context of habeas corpus in Preiser v. Rodriguez, *supra*. In that case, the Court justified the application of the exhaustion rule in habeas corpus by invoking the concept of federal-state comity, while ignoring that it should be no less a consideration in prisoner § 1983 actions. To resolve these problems one must examine the "[v]arying views as to the breath of the *Wilwording* holding, the strength of prior precedents, the proper character of the federal balance, and the potential impact upon judicial administration."[2] It is therefore imperative that this Court consider the validity of these factors and determine under what circumstances, if any, a requirement of exhaustion under § 1983 would be permissible.

A. *Varying Views As To The Breadth Of The Wilwording Decision*

In its brief *per curiam* opinion, the Court in *Wilwording* summarily treated the question of administrative

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[2] *See*, "RECENT DEVELOPMENTS, State Inmate's Challenge To Conditions of Prison Confinement Is Cognizable Under 42 U.S.C. § 1983 And Entails No Requirement Of Exhaustion State Remedies." 72 Col. L. Rev. 1078, 1086 (1972).

exhaustion without even mentioning whether or not such a remedy was available to the plaintiff. While it would appear that *Wilwording*, in light of *Damico* and *Houghton*, suggests that resort to state administrative remedies need never be exhausted before litigating § 1983 suits in federal district court, its holding is far more limited. *See* Kochie v. Norton, 343 F. Supp. 956, 959 (D. Conn. 1972). The main holding in this case is that exhaustion is not required when the state remedy is a judicial one, or is an administrative one which cannot provide adequate protection to the right allegedly impaired. Nowhere does the Court discuss the question of requiring a civil rights plaintiff to exhaust viable state administrative remedies before litigating his claim in a federal court.

[1] This has provoked a variety of views as to the interpretation to be given to *Wilwording*. In *Rodriguez*, the majority of the Second Circuit interpreted the decision as a mandate prohibiting the requirements of exhaustion, whether judicial or administrative. The three dissenting judges in that case viewed it as merely suggesting that no exhaustion be required, but that it did not mandate that result in a particular case. Judge Newman in Kochie v. Norton, 343 F. Supp. 956 (D. Conn. 1972), contended that *Wilwording* and its predecessors held that state judicial remedies need not be exhausted, and administrative exhaustion was not a prerequisite to federal action when the remedy was inadequate under the circumstances.

This Court is of the opinion that Judge Newman's reasoning, when viewed in light of the consequences of a "no exhaustion" rule, is compelling.

B. *The Strengths Of Prior Precedents*

This factor has already been discussed at great length in this opinion, and at this juncture it is only necessary to reiterate that at no time has the Supreme Court explicitly discussed the question of administrative exhaustion under § 1983.

C. *The Proper Character Of The Federal Balance*

In his opinion in Bundy v. Cannon, 328 F. Supp. 165, 171 (D. Md. 1971), Judge Thomsen of this bench quoted from the case of McCloskey v. State, 337 F.2d 72, 74 (4th Cir. 1964):

> . . . In the great mass of instances, however, the necessity for effective disciplinary controls is so impelling that judicial review of them is highly impractical and wholly unwarranted. The remedy of the inmate is through administrative review, which ought to be available always. [328 F. Supp. at 171].

This belief that the federal courts should not intervene in the functioning of state prisons except in the rarest occasions is founded on the assumption that there does exist an adequate remedy through administrative review. This is clearly shown when Judge Thomsen went on to say:

> This court notes that by the Act of 1971, ch. 210, approved April 29, 1971, effective July 1, 1971, Maryland has provided what appears to be an excellent system of administrative review of inmate grievances, through an Inmate Grievance Commission, with an ultimate right of review by the State Courts. [328 F. Supp. at 171].

What appeared to be an effective administrative procedure to Judge Thomsen in 1971, has been judged to be just that. In State of Maryland v. McCray, 267 Md. 111, 144, 297 A.2d 265 (1972), the Court of Appeals of Maryland stated:

> We think that the Inmate Grievance Commission Act and the implementing rules adopted by the Commission provide "a simple and workable procedure by which every person in confinement who has, or thinks he has, a grievance or complaint can be heard *promptly, fairly,* and *fully,*" and *obtain a judicial review* with respect to

his constitutional and statutory rights. [267 Md. at 144, 297 A.2d at 282. (Emphasis added)].

It should be pointed out that to require state prisoners to exhaust such an administrative remedy does not hold them to a stricter standard of exhaustion than other civil rights petitioners, as *Wilwording* seems to suggest. In McGaw v. Farrow, 472 F.2d 952 (4th Cir. 1973), the court held that members of the United States Army stationed at Fort Eustis, Virginia were required to exhaust administrative remedies provided by the military service as a prerequisite to relief in the civil courts for violation of their constitutional rights. *Citing*, United States ex rel. Taylor v. Fritz, 446 F.2d 36, 37 (8th Cir. 1971); Gonzales Salcedo v. Lauer, 430 F.2d 1282, 1283 (9th Cir. 1970); Karpinski v. Resor, 419 F.2d 531, 532 (3rd Cir. 1969); United States ex rel. Berry v. Commanding General, 411 F.2d 822, 824 (5th Cir. 1969); Sohm v. Fowler, 124 U.S. App. D.C. 382, 365 F.2d 915, 917 (1966).

In United Automobile, Aerospace, and Agricultural Implement Workers of America (UAW) v. State Farm Mutual Automobile Insurance Company et al., 350 F. Supp. 522 (N.D. Ill. 1972), a civil rights action was filed by a union and black and white motorists against the insurance rating board, insurance companies and insurance advisory organizations on the ground that, in establishing zones for new automobile insurance premium rates, defendants separated the bulk of the Negro population of the city in one zone and imposed substantially higher rates in that zone. The court held that the civil rights actions could not be maintained until the plaintiffs had exhausted their available state adminis.rative remedies, which the court found to be an effective administrative remedy. While the *U.A.A. & A.W. of America* case involved a suit filed under § 1983, *McGaw* did not. However, the need to provide a plaintiff with protection against violations of his constitutional rights is no less great when the defendant is the United States Army. Thus, if a defendant is required to exhaust

administrative remedies for an alleged violation of his rights by an agency of the federal government when the only available judicial forum is the federal court system, it would seem inconsistent not to require such exhaustion when the deprivation is under color of state law.

The Court also notes that plaintiffs charging employment discrimination under Title 7 and the Age Discrimination Act are required to exhaust administrative remedies provided by statute. While it can be argued that exhaustion is required in these cases because Congress specifically provided for it, the rationale supporting such a requirement under § 1983 is no less compelling. The Court notes that while exhaustion in habeas corpus actions is also provided by statute, the Supreme Court had required exhaustion prior to Congress enacting this amendment in 1948. *See* Ex parte Royall, 117 U.S. 241, 6 S. Ct. 734, 29 L. Ed. 868 (1886); Urquhart v. Brown, 205 U.S. 179, 27 S. Ct. 459, 51 L. Ed. 760 (1907); Ex parte Hawk, 321 U.S. 114, 64 S. Ct. 448, 88 L. Ed. 572 (1944).

D. *The Potential Impact Upon Judicial Administration*

This Court has already noted the statistics released in the Annual Report of the Director of the Administrative Office of the United States Courts, and the deluge of litigation instituted in this Court by the plaintiff, Milton McCray. When one evaluates the astronomical rise in prisoner civil rights litigation since 1961, and views the abuse of this right of access to the courts, it becomes apparent that not only will there be a detrimental impact upon the judicial system and its administration, but the legitimate complaints of those prisoners whose constitutional rights are in fact being violated may not be litigated for years.

However, if there is available a viable administrative remedy, then the spurious claims will be weeded out, and the district courts will be called upon to hear only those cases that are clearly of constitutional dimension.

In addition, the federal district courts will have the benefit of a complete record of the administrative proceedings before the Inmate Grievance Commission, and the appeals to the state courts. Finally, when an infringement of a prisoner's rights is found, but equitable relief can be more effectively enforced by the State, this Court will be able to remand the case to the State. Under this procedure a much better record will be available to the court, the constitutional issues presented by the complaint will be definitely articulated, and the Court will not be bound to act as an advocate for the plaintiff to determine what constitutional grievances he might have.

[2] The test that is to be used to determine the propriety of requiring administrative exhaustion in a particular case was stated in Armsden v. Cataldo, 315 F. Supp. 129 (D. Mass. 1970). In that case Judge Caffrey said:

> Relevant to a resolution of whether or not exhaustion is required are considerations of the adequacy of the available state remedy, of whether or not it is really a remedy in fact as distinguished from being a remedy in theory, and of the extent of the state's interest in the subject matter of the litigation. [315 F. Supp. at 131].

Thus, the test of determining the adequacy of the available administrative state remedy is three-fold. First, the court must analyze the theoretical due process adequacy of the state remedy, particularly from the standpoint of making sure the remedy does not contain the forbidden indicia of pre-judgment which renders exhaustion inappropriate. Second, the court must look at the remedy in practice, to see that it is being administered in an even-handed and fair manner. Finally, the third relevant consideration is one that all federal courts must bear in mind when they are called upon to interject themselves into matters entrusted by our form of Government to the realm of the States, and that is, of course, the extent of the State's interest in the subject matter of the federal litigation.

Our first inquiry must be answered by looking at the statute which created the Inmate Grievance Commission in order to determine whether the remedy therein provided is adequare in theory to redress the legitimate grievances of the inmates. The Commission is made up of five members, two of whom are lawyers, two of whom are "persons of knowledge and experience in one or more of the fields under the jurisdiction of the Department of Public Safety and Correctional Services," and one of whom is a member from the public-at-large. The current members of the Commission are:

> James G. Boss, Chairman — Attorney-at-law;
>
> James V. Bennett — Attorney-at-law, and a nationally known penologist and retired Director of the Federal Bureau of Prisions;
>
> Maceo M. Williams — A former Patuxent Institution guard and city probation officer who is now an official of Baltimore's Concentrated Employment Program, an anti-poverty program;
>
> Edgar A. Fulton — A retired insurance man who is now an industrial relations consultant to the U. S. Bureau of Prisons, and a member of the Maryland Advisory Board for Corrections, Parole and Probation; and
>
> Ralph S. Falconer — Retired from Maryland Department of Parole & Probation.[3]

It is evident that the Governor has made every effort to appoint to the Commission individuals with knowledge in relevant areas and who are equipped with the perspicacity to make objective judgments, free from any institutional preconceptions of the facts of a particular in-prison incident.

The mechanics of the grievance procedure are set forth in detail in the statute. 41 Md. Code Ann. § 204F

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[3] At the time of the hearing in these cases, June 11 through June 14, 1973, Jeffrey Levitt, an attorney-at-law, was a member of the Commission. He has since resigned, and Mr. Falconer is newly-appointed to fill the vacancy.

(d)-(l) (Supp. 1971). Suffice it to say here that the procedures assure a detached and unbiased resolution of particular cases, culminating in judicial review of the administrative adjudications.

Any person confined in a state prison, or any patient of Patuxent Institution, who "has any grievance or complaint against any officials or employees of the Division of Correction or the Patuxent Institution"[4] may submit the grievance or complaint to the Commission. The Commission is given original administrative jurisdiction unless the particular facility in which the complaining inmate is confined has an internal grievance procedure approved by the Commission, in which case the inmate must first exhaust the institutional procedure before filing with the Commission.

According to the testimony of the present Executive Director of the Commission, Dene L. Lusby, a grievance is first screened by the Executive Director. While the complaint may be dismissed if it "is determined to be on its face wholly lacking in merit," this statutory authorization is not used. Mr. Lusby testified that the Commission did not want to deny an inmate the opportunity for a hearing. However, complaints are dismissed without a hearing when the initial screening process reveals that the Commission lacks jurisdiction, as where an inmate erroneously files for habeas corpus relief with the Commission. In practice, then, the Commission's jurisdiction mirrors the traditional areas of § 1983 jurisdiction in prisoner cases.

When questioned about the initial filings with the Commission, Mr. Lusby stated that as of May 31, 1973, 923 complaints had been received, of which 98 cases (10%) remained opened to be investigated and/or heard if the same were not dismissed, withdrawn or informally resolved. Under the present Commission procedures, an inmate may request to withdraw his com-

[4] Virtually all § 1983 complaints are premised upon some abuse of authority possessed under color of state law; such was the jurisdictional meaning read into § 1983 in Monroe v. Pape, 365 U.S. 167, 81 S. Ct. 473, 5 L. Ed. 2d 492 (1961).

plaint, and he will usually be allowed to do so immediately. However, in a few instances, when the nature of the complaint warrants, he is required to withdraw in front of the Commission. Mr. Lusby further stated that he attempts to informally resolve prisoner complaints by contacting the involved institution and requesting that it voluntarily abate the condition upon which the inmate based his grievance. In these instances any resolution would be favorable to the complaining inmate.

The Executive Director's testimony concerning a number of Commission statistics may be summarized as follows:

1. Complaints received from 7/1/71 to 5/31/73	923
2. Administrative dismissal (complaints that are on their face without merit, complaints that are withdrawn by the inmate, complaints over which the Commission lacks jurisdiction and complaints that are informally resolved)	507
3. Hearings held from November 1971 to May 31, 1973	318
4. Disposition	
a. Some or all relief granted	103
b. No relief granted	153
c. Moot, because prisoner released or escaped	10
d. Pending disposition	50
5. Open complaints as of May 31, 1973	98
6. Scheduled for hearing	58
7. Not scheduled for hearing	40

If the complaint is not dismissed, withdrawn or informally resolved, the Commission is directed to hold a hearing on the grievance as promptly as practicable. The Commission meets twice a week, generally on Wednesdays and Fridays, to hear the grievance of any inmate confined to an institution within the Division of Correction, at the institution where the inmate is housed. At least three Commissioners must sit for each hearing, and decisions are made by a majority of those sitting. A Voice-writer record is made of all hearings,

and is transcribed when the inmate seeks judicial review. This procedure was adopted on December 1, 1972. The Commission's decision is issued in the form of an order, setting forth findings of fact, the Commission's conclusions, and the disposition of the complaint. The disposition may take either of two forms. If the complaint is found after a hearing to be "wholly lacking in merit" it may be dismissed, and such dismissal shall constitute the final order of the Commission for purposes of judicial review. On the other hand, if the complaint is found to be meritorious, in whole or in part, the Commission will so notify the Secretary of Public Safety and Correctional Services. The Secretary may then take either of two actions. He may reverse or modify the order, if he disagrees with the Commission. If he agrees with the Commission's order, as received or as modified, the Secretary shall order the appropriate official of the institution against whom the grievance was filed to accept the Commission's recommendations. Further, the Secretary is empowered by the statute to "take whatever action he deems appropriate in light of the Commission's findings." It is intended that the Secretary will use this grant of power to discipline or otherwise correct officers under his command who have been found guilty by the Commission of engaging in conduct giving rise to a legitimate complaint by the inmate affected. The Secretary's order carrying out the recommendations of the Commission shall constitute a final order for the purpose of judicial review.[5]

The Act gives the Commission the power to require by subpoena the production of any documents by the person or institution under investigation. Further, the Commission may, by subpoena, require the attendance of any person as a witness and the production by that person of any relevant documentary evidence. On cross-examination, Mr. Boss, the Chairman of the Commis-

[5] It was asserted at the hearing that on two occasions the Secretary reversed the Commission's recommendation. These reversals were appealed, and in both cases the Commission's recommendation was reinstated.

sion, testified that no witness has ever refused to appear before the Commission and that there had never been, to the best of his knowledge, any requests for a subpoena. While, the testimony of Robert Coulter, the first Executive Director of the Commission, contradicted this assertion of Mr. Boss, and in general tried to discredit the Commission, several factors mitigated the effect of his testimony. First, the period that he was serving the Commission as its Executive Director can best be described as the Commission's formative period. It was involved in implementing the directives of the enabling statute, and it is understandable that problems would exist at this time. Secondly, while his testimony conflicted frequently with that of Mr. Lusby and Mr. Boss, it is significant that neither Mr. Boss nor Mr. Lusby were associated with the Commission at the same time as Mr. Coulter. Therefore it is understandable that Coulter's experience with the Commission's procedures might be entirely different from that of the present Chairman and Executive Director.

The Act also spells out the procedural requirements of the Commission's hearings. In addition to the fact that the hearings of the Commission are to be recorded and transcribed as required, the Act makes several specific provisions to insure that the tests of procedural due process are met by the Commission's hearings. The inmate-complainant has the right to appear in person before the Commission, and, unlike a trip to court for the inmate, this appearance will not impose any special security problems insofar as the Commission is empowered to hold its hearings at any correctional facility, including the Patuxent Institution. The inmate-complainant is given the right to call witnesses in support of his position, subject to the discretion of the Commission as to the number of witnesses called and the relevance of their testimony. Only witnesses whose testimony would be merely cumulative are excluded. This determination is based on the complaining inmates' assertions as to the subject matter of their testimony. It is further provided that the inmate-complainant is to be given a reasonable opportunity to

question (cross-examine) *any* witnesses who testify before the Commission. These rights of the inmate to the attendance, examination and cross-examination of witnesses "shall not be unreasonably withheld or restricted by the Commission."

The witnesses are not sworn because the Commission has decided that inmates appear to be more relaxed testifying when they are not concerned, or threatened, with the consequences of perjurious testimony. Finally, the inmate is allowed to be represented by an attorney of his own choosing at his own expense, by a law student, or by another inmate. Mr. Lusby testified that an inmate has counsel about 5-10% of the time, and that they are represented either by counsel or a law student approximately 30% of the time. Of course, there is no need for the appointment of counsel, at the expense of the State, for the purpose of representing the inmate, as the hearing is solely remedial, not disciplinary or punitive, in nature.

Upon the entry of a final order in his case, the inmate-complainant may initiate judicial review of the orders of the Commission and the Secretary in the circuit court of the county or city in which he is incarcerated. The judicial review is a review on the record and is limited to a determination of whether there was a violation of any right of the inmate protected by federal or state laws or constitutional requirements. Although Ch. 210 is silent on the point, it appears from a reading of the Maryland Rules of Procedure and the Administrative Procedure Act (see Md. Code Ann., art. 41, § 256) that an appeal can be taken from the action of the reviewing circuit court to the Court of Appeals of Maryland.

[3] It appears to this Court that there is a viable alternative to direct federal judicial intervention in the State correctional process via § 1983. When the enlightened procedures prescribed as a result of Bundy v. Cannon, *supra*, for the imposition of in-prison punishment are combined with the more than adequate remedial route furnished by the Inmate Grievance

Procedure Act, there emerges a picture of a state correctional system which is truly cybernetic. Indeed, the state judicial system has become increasingly involved in remedying the complaints of Maryland inmates, as witness the unprecedented action of the two-judge Circuit Court which conducted an extensive inquiry into the conditions at the Patuxent Institution, McCray v. State, Misc. Pet. 4363 (Cir. Ct. Mont. Co., November 11, 1971), *reversed in part*, State v. McCray, 267 Md 111, 297 A.2d 265 (1972). In that case the Court of Appeals of Maryland noted:

> We take judicial notice that the Commission is now fully operative. It began operation upon the appointment of an Executive Director on 30 November 1971. Rules and Regulations implementing Code, Art. 41, § 204F were adopted. Public Safety and Correctional Services, 12.07.00.00.-12.-07.00.05. The first hearing session was held on 17 December 1971 and hearings have been held continually since that time. Almost 600 complaints have been received from inmates and about 100 orders issued. The complaints and the disposition of them are open to public inspection pursuant to Code, Art. 41, § 204F(i). [267 Md. at 144 n. 27, 297 A.2d at 283].

Further evidence of the Inmate Grievance Commission's viability was reported in *The Sun* on December 8, 1972. *The Sun* reported: "An order banning the use of an extremely painful restraining device known as the 'iron claw' in Maryland prisons has been announced by the State Inmate Grievance Commission." This order was the result of a complaint filed by two prisoners at the Maryland Correctional Institution in Hagerstown that the iron claw was used on them in violation of the eighth amendment of the Constitution.

The State's interest in the subject matter of the prisoner complaints under § 1983 is paramount. The extent of this interest was clearly defined by the Supreme Court, Preiser v. Rodriguez, *supra*, in the

passage already cited in this opinion. Thus is presented the picture of a complete, self-contained and self-executing administrative process set up by the State to resolve prisoner complaints justly and expeditiously. Clearly, the federal courts have neither the time nor resource, nor experience enough, to justify their interjecting themselves into the job of running state penal institutions.

The question of federal court interjection into this area has been the object of considerable study during the last year. One such study is the Report Of The Study Group On The Caseload Of The Supreme Court, 57 F.R.D. 573 (1972). In that Report the problem of prisoner petitions is discussed and analyzed as follows:

> (d) *A court of criminal appeals. The problem of prisoners' petitions.* The dangers of polarization and politicization would be particularly intense in an appellate court whose only concern was the review of criminal convictions. Moreover, there is an inherent dilemma in such a plan, turning on whether or not there would be further review on certiorari in the Supreme Court. If such review were provided, the screening function of the Supreme Court would not be materially relieved. If review were not provided, defendants in criminal cases would be placed in an inferior and invidious position with respect to access to the Supreme Court. We reject a proposal that would put this class of litigants in that position.
>
> But the problem of prisoner petitions, which the Supreme Court shares with lower federal courts and to some extent with State courts, has grown ever more pressing in the last decade or so, and does demand special attention. We refer both to collateral attacks on criminal convictions and to complaints concerning conditions in prisons.
>
> On the Supreme Court's docket at the October Term, 1971, the number of petitions in habeas corpus and other collateral attack cases was 758. Total State and federal prisoner cases filed in the lower federal courts in 1971 came to 16,266.

> Most of the cases are brought by State rather than federal prisoners, although filed in federal courts, and most are habeas corpus petitions. But a substantial number of prisoner cases—3,129 filed in the federal courts in 1971—are civil rights complaints concerning conditions in prisons, and these will increasingly filter up to the Supreme Court. The continuing rise in the volume of prisoners' petitions, on the docket of the Supreme Court as also on the dockets of all federal courts, is reflected in figures collected by the Solicitor General. There is close identity between these petitions and filings *in forma pauperis*. The Solicitor General reports that the number of papers filed by his office in the Supreme Court of the 1971 Term in ifp cases increased by 35.1% over the previous Term. The comparable increase in paid cases was 17.3%. (Memorandum To The Solicitor General's Staff, July 6, 1972.)
>
> The number of these petitions found to have merit is very small, both proportionately and absolutely. But it is of the greatest importance to society as well as to the individual that each meritorious petition be identified and dealt with. And yet it seems a misallocation of resources to impose the burden of sifting through the mass of these petitions on federal judges, let alone on Supreme Court Justices. Moreover — and this is at least as important — these overburdened judges and Justices, charged with so many other highly important functions, are less likely to give full and careful attention to each petition than officials whose special task it might be made to do so. The problem is somewhat analogous to one faced by the medical profession. Mass screening of thousands of people will uncover cancer in very few, but it will diagnose it in some at a stage where prospects of cure are good. The mass screening enterprise is, therefore, justified. But the screening is not conducted by highly trained surgeons. To use surgeons for this purpose would be to misuse them. Nor, unless they are relieved of their other, more

demanding functions, will surgeons likely perform this routine task with the care it routinely requires, if undertaking it at all is to be justified.

As the Solicitor General has remarked (Memorandum To The Staff, *supra*), "[i]t seems obvious that there should be a better way to deal with these questions [presented by ifp prisoner petitions], at least with respect to collateral review." It is satisfying to believe that the most untutored and poorest prisoner can have his complaints or petitions considered by a federal judge, and ultimately by the Supreme Court of the United States. But we are, in truth, fostering an illusion. What the prisoner really has access to is the necessarily fleeting attention of a judge or law clerk. The question is, would it not be better to substitute for the edifying symbol, and the illusion that it presents, the reality of actual, initial consideration by a non-judicial federal institution charged exclusively with the task of investigating and assessing prisoner complaints of the denial of federal constitutional rights. This institution, headed by an official of high rank, would have a staff of lawyers and investigators, and a measure of subpoena and visitatorial powers. It would be charged to investigate complaints, make a response to them, and where possible, try to settle in-prison grievances by mediation.

All petitions for collateral review or for redress of grievances concerning prison conditions, from State or federal prisoners, which could now be filed in a federal court, would go initially to this new institution at the election of the prisoner or by referral to it at the discretion of the court in which a petition is filed. Three months might be allowed the new service for dealing with a complaint or petition lodged orginally with it. At the end of this period the prisoner could file his papers with an appropriate court, but the papers would be accompanied by a report from the new institution.

Thereafter, the matter would proceed as it would now.

Obviously, the details of this proposal remain to be worked out; we believe it merits prompt further study and consideration. [57 F.R.D. at 586-588].

Another suggestion concerning the problem of prisoners' petitions appeared in an article entitled "Prison Ombudsmen Provide a Safety Valve," 56 Judicature 314, March 1973. The article discussed the institution of an ombudsmen system in the prisons to provide effective relief from maladministration. The author then went on to say:

> In an era where the courts have become overburdened, emphasis should be placed on finding alternative or complementary means of achieving just results without unduly increasing the courts' caseloads. An office of ombudsman could serve this function. As primarily a complaint investigation mechanism, the office could readily eliminate duplication of effort by providing independent offices of state legislatures, the courts, and even the correctional administrators with information which would not otherwise be available to them. By improving communication and faciliting investigation, the ombudsman would be able to complement the sophisticated information systems which presently exist in government.
>
> The true value of the ombudsman lies not as a substitute for existing complaint handling mechanisms but as an added protection which attempts to enhance the total grievance machinery by eliminating the present system's weaknesses. It would serve to stimulate present procedures within the correctional system itself, and by so doing would lessen the number of grievance complaints that are now gravitating to the courts. By reducing the number of frivolous complaints and complaints which are not well-suited for judicial determination, the courts would be provided more time to

> devote to adjudicating issues which are of greater importance. An avenue of redress such as this might indeed cause the courts to become more receptive to the complaints which eventually reach them. [56 Judicature at 315].

It appears to this Court that the Maryland Inmate Grievance Commission combines the best of both suggestions, that is, initial investigation by a non-judicial institution charged with the responsibility of investigating and assessing prisoner complaints, and provision for subsequent review by the courts. In addition, the federal-state balance is preserved in the manner expressed by the Supreme Court in Preiser v. Rodriguez, *supra*.

In light of these developments, the least the federal court can do is to give the State system a chance to continue to purge itself of its abuses, which can only be done if the inmate complaints are channeled via the inmate grievance route. It must be emphasized that the imposition of the exhaustion requirement outlined in this opinion does not take away the right of the aggrieved inmate to resort to a federal remedy. All it does is to put the remedy one step beyond immediate reach. If the inmate does not receive justice from the State procedures, he can then file his complaint in the District Court under § 1983. As previously pointed out, this Court does not think that anything in the prior trend of decisions prohibits this action, although, in all candor, the cases would not seem to encourage it. But those were different cases dealing with different facts, with administrative remedies almost neolithic compared to the Maryland Inmate Grievance Procedure. In fact, even if *Wilwording* is interpreted broadly, the United States Court of Appeals for the Fourth Circuit, in Hayes v. Secretary of Department of Public Safety, 455 F.2d 798 (1972), indicated:

> While Maryland has recently established an Inmate Grievance Commission . . . to determine and recommend the proper redress for meritorious grievances of inmates of Patuxent and other

> correctional institutions, we take judicial notice of the fact that the Commission is not yet fully operative. When it is, there will be time enough for the Supreme Court to determine if Monroe v. Pape, and we, our own decisions, should be reexamined. . . . [455 F.2d at 800].

This Court believes, as does the Court of Appeals of Maryland, that the Commission is now fully operative, and takes judicial notice of that fact. Therefore, the time for reexamination is now.

In prisoner rights cases, as in any other § 1983 cases, the federal courts are called upon to exercise both aspects of their jurisdiction, in equity and law. Insofar as the Maryland statute creating the Inmate Grievance Commission does not give the Commission, (or the reviewing courts, for that matter) the power to award money damages for the deprivation of constitutional rights which may not amount to a tort under the laws of Maryland, a serious question as to the propriety of our action might arise if we made the Maryland administrative procedure the sole and *exclusive* remedy for prisoners seeking redress for deprivation of constitutional rights, thus forever barring them from access to the federal damages remedy inherent in § 1983. However, the only thing which the imposition of this exhaustion requirement would do in these cases is to work a *postponement* of the ultimate award of damages in a meritorious § 1983 suit. Although it may be true that very few § 1983 cases ultimately result in the awarding of damages, it is equally true that a federal court cannot close its doors forever to a claim for damages in § 1983 cases, even if an otherwise wholly adequate state remedy exists.

It is clear that the enabling legislation gives the Commission, and seems to give the reviewing courts, only powers comparable to the equity powers exercised by the federal courts, in that the Commission and the Secretary can order the officers and institutions of the correctional system to stop practices offensive to constitutionally safeguarded rights. The fact that

directives have been issued by the correctional system was testified to by Mr. Lusby, and the Warden of the Maryland Penitentiary, Gerald H. McClellan. The plaintiff introduced evidence that one of these directives, which requires two guards to be present when a prisoner's cell is being inspected for various reasons, has not been followed. The Warden, however, pointed out that this was due to a tremendous shortage of prison guards. Under such circumstances, it would make little difference if the directive had been issued by a federal court under the threat of contempt, or by the Secretary of the Commission.

Of the two types of relief available under § 1983, *viz.*, injunctive relief and monetary damages, the type that demands the more immediate adjudication is obviously injunctive relief. Mr. Lusby testified that the Commission had on several occasions issued orders that, in essence, granted the complaining inmate injunctive relief. In I.G.C. No. 1521, In the matter of: Joseph Wallace # 107093, Maryland Penitentiary, an interim order was issued on December 4, 1972. In this order the Commission recommended that Mr. Wallace be taken to the University of Maryland Hospital for an orthopedic examination. As a result, the inmate was taken to the hospital for examination on December 15, 1972.

In I.G.C. No. 1383, In the matter of: James Brady et al., Patuxent Institution, a grievance was filed to contest the suspension of "lawn visits" by the Institution. It had been the practice at Patuxent to permit such visits on Sundays during the warm weather months, weather permitting. During one of the visits one of the patients attempted to escape, and because the other patients did not try to deter the escapee, the Institution suspended all lawn visits for twelve weeks. As a result of this complaint the Commission issued an interim order in the nature of an injunction staying the suspension of the "lawn visits" until an adequate hearing was held.

Mr. Lusby also stated that the Commission had assumed that it had the power to grant "class relief." While the plaintiff pointed out several grievances requesting class relief which had not been granted, it is significant that they were dismissed as being without merit. In I.G.C. Nos. 1295 and 1282, the Commission made recommendations that were approved by the Secretary for the proper administration of the protective custody tier at the Maryland Penitentiary.

It is clear that not only does the State Inmate Grievance Commission have power comparable to the United States District Courts in such cases, but it is certain that the powers of the Commission can, in most cases, be exercised considerably more quickly to remedy offensive patterns of official conduct than can the powers of the federal courts. This is due, of course, to the crowded dockets of the courts in which, of necessity, prisoner cases often receive the lowest priority. Also, the fact that the Commission functions in close conjunction with the Secretary of Public Safety and Correctional Services gives its orders a degree of practical enforceability which those of the court often lack, insofar as judicial decrees are dependent for their enforceability upon respect for the judicial process and fear of incarceration for contempt. Obviously, very few state officers are ever imprisoned for contempt of a federal court order, and one may wonder how willingly they comply with the terms of such an order. However, where, as here, the authority enforcing an order to cease-and-desist from a certain practice is the authority with the power to fire or otherwise discipline an officer who balks at compliance, it would seem that corrective orders would be more enforceable as a practical matter than may be similar orders of a federal court. An added factor weighing in favor of the superiority of the state administrative procedure in the area of equity-type relief, is the fact that the Commission, through the Secretary, has power to discipline, or even fire, persons who are guilty of abusing prisoners. Obviously, no

federal court has like power for not even the most fervent federalist would support the notion that a federal court can take administrative sanctions against particular state officers.

[4] Thus, it is clear that the Maryland Inmate Grievance Procedure offers not only an effective, but a swift, alternative to the exercise of federal equity power under § 1983. Of course, upon exhaustion of the state remedy, an inmate, in a proper case, may still call upon the equity power of the federal court if the exercise thereof is needed in a particular case. If, of course, the remedy of damages is needed to make a prisoner whole again in a particular case, that remedy will likewise be available to the prisoner after he has exhausted the state administrative procedure. United Automobile, Aerospace, and Agricultural Implement Workers of America (UAW) v. State Farm Insurance Company, 350 F. Supp. 522 (N.D. Ill. 1972). Unlike the situation with respect to injunctive or other equity-type relief, there is no sense of immediacy attendant upon the awarding of money damages to redress particular deprivations of constitutional rights. The money damages are only given in such cases where the rights infringed upon are admittedly incapable of any sort of rational valuation, because it oftens seems the only way to compensate a person for the wrong that he has suffered. Indeed, our whole common law scheme of awarding damages in civil cases turns upon the assumption that the money paid by the malefactor to the injured party is the cure-all for legal wrongs. We are not so sure that this is the case in the prisoner rights area, insofar as the equity-type relief which the Maryland Commission can give, as outlined above, seems not only more readily available, but also more meaningful. At any rate, it is clear that whatever postponement of the right to money damages under § 1983 is worked because of the imposition of an exhaustion requirement does not amount to a deprivation of the ultimate right to such relief in theory nor is it a deprivation in practical effect. This is true because an award of money does not require the immediate attention which ought to be given to

demands for equitable relief, which in fact is given under Maryland procedure. The key point is that the ultimate right to damages is preserved during the complainant's pursuit of his state administrative remedies, and is not destroyed by a requirement that he resort to these remedies before bringing his federal action under § 1983.

[5] Therefore, this Court concludes that before it will exercise jurisdiction over a prisoner § 1983 complaint, the inmate must exhaust the available state administrative remedy provided by the Maryland Inmate Grievance Commission procedure. Even if the complaint seeks only monetary damages, this avenue of relief should be exhausted. The claim for monetary damages is inextricably tied to prison regulations and disciplinary procedures. The Maryland Inmate Grievance Commission provides a forum with built-in judicial review which can more expertly sort out the meritorious from the frivolous.

Such a disposition by initial action in the federal courts is not attainable except by tortuous process, as demonstrated by these cases as well as the vast majority of other § 1983 prisoner petitions. Nor does it frustrate the original intendment of § 1983, for having taken this route the complaining prisoner can come to this Court with the issue of liability clearly defined on the record. Thus, the federal court can readily dispose of the litigation in the same manner in which it now handles habeas corpus petitions.

These two McCray cases, in accordance with the foregoing opinion, should be dismissed. But to further highlight the tedious process in which a federal court must engage, these cases will be disposed of on the merits as well.

II.

MERITS

[6] The complaints in both of these actions invoke jurisdiction of the Court pursuant to 28 U.S.C. § 1343(3)

and (4), 42 U.S.C. § 1983, and the Constitution of the United States of America. Plaintiff alleges in both cases that the acts of the defendants unconstitutionally deprived him of his right to be free from physical abuse and cruel and unusual punishment as guaranteed by the eighth and fourteenth amendments to the Constitution. He further contends that in both cases this abuse and punishment was arbitrarily imposed in violation of the due process clause of the fourteenth amendment. He also charges that Captain Burrell acted to deny him proper medical care following injuries allegedly received in a fire in his cell.

The testimony in both of these cases, as in most prisoner complaints of this type, is in conflict. While a general picture of the circumstances did develop, the question of liability hinges on the credibility of the witnesses. The Court as the trier of the facts must consider not only the evidence introduced, but also must evaluate the demeanor of the witnesses to determine their credibility. The contradictory statements of the plaintiff during the trial of these cases considerably diminished his credibility. One obviously platant false assertion occurred after he had informed the Court that he had lost count of how many cases he had pending before the various judicial forums in the State. In response to a question posed by the Court, Mr. McCray stated that he never files complaints in more than one court based on the same cause of action. After the conclusion of the trial, it came to the Court's attention that the plaintiff had filed a suit in the Superior Court of Baltimore City alleging the same constitutional deprivations as are involved in Civil No. 72-68-N (Milton McCray v. Captain Burrell). While the defendant in 72-68-N is Captain Burrell, and the suit filed in the Superior Court is against the Warden of the Maryland Penitentiary, 72-68-N was amended at the time of trial by the plaintiff eliminating the Warden and the Penitentiary Medical Staff as defendants. Clearly this indicates, contrary to the plaintiff's contention at trial, that he does attempt to litigate the same causes of action simultaneously before more than

one forum. A copy of the original complaint filed in 72-68-N, and a copy of the complaint filed in the Superior Court are included as appendices to this opinion.

The factual situations in both cases center on disruptive incidents involving the plaintiff, and a determination by the defendants that he be placed in an isolated cell without clothes or a mattress. In Milton McCray v. Sgt. V. D. Smith, (Sgt Bernard D. Smith) Civil No 72-234-N, the plaintiff alleged that on November 20, 1971, while he was confined on the Maryland Penitentiary's South Wing (a wing used to house inmates who have violated prison regulations), Sgt. Smith removed him from his cell, and placed him in the isolated confinement area (I.C., known to the inmates as the "hole") for approximately two days.

The plaintiff was on the South Wing between November 17 and November 20, 1971. Prior to November 20th, Sgt. Smith had never met McCray. Plaintiff admitted that on November 20, 1971 he was placed in a cell on the "street side" of the South Wing, but that he asked to be moved to another cell when he discovered that the cell was in an unsanitary condition (he alleged that there were lice in the cell). Sgt. Smith then came to McCray's cell and took him to the "flats" (the lowest tier on the South Wing). Plaintiff was then given a shower and was deloused and Sgt. Smith was told by the Warden of the Penitentiary to provide the plaintiff with his law books and legal materials while he was on the South Wing. However, these orders were not complied with because, according to the unrefuted testimony of the defendant, the process of packing and moving personal belongings could take from two to three days to complete. The Court notes at this juncture that there was testimony during the course of these trials that the Penitentiary has been forced to operate with a substantial shortage of prison personnel.

After the plaintiff had been placed in a cell on the fourth tier, "yard-side," of the South Wing, he began "hollering and yelling," demanding his legal materials and his medicated shower. Apparently this disturbance,

which was quite substantial according to testimony of both the plaintiff and the defendant, prompted Sgt. Smith to remove McCray from the South Wing and place him in the isolated cell area. Clearly this measure was taken to avoid the possibility of causing a greater disturbance among the other inmates.

While the defendant was transferring the plaintiff from his cell on the South Wing to the I.C. area, McCray began shouting insults and threatening to do bodily harm to himself. Interpreting these threats as an indication of mental and emotional instability, and having personal knowledge of prior incidents involving inmates in isolation who had committed suicide, Sgt. Smith decided to strip McCray and remove the mattress from the cell. He testified that he felt it was better to subject the plaintiff to some discomfort than to risk that he might attempt to kill himself.

The cell in which McCray was placed, I.C. #5, was about 4-5 feet wide, 12-16 feet long and 12 feet high. It had four concrete walls, a concrete ceiling and a concrete floor. At the front of the cell was a solid, metal door and a barred, grill-type door, either or both of which could be closed. There was a toilet and a sink in the cell, and on the floor was a concrete slab about 9 feet long, 3 feet wide and 12 inches high. Normally a mattress is placed on this slab and serves as the inmate's bed.

It was shown during the trial that the recommended procedure, when a prison official places an inmate in the I.C. area, requires that he notify his immediate superior. It is significant that no evidence, other than the absence of any reference to McCray in the log book during this period, was introduced to indicate that the defendant had not complied with this directive. Sgt. Smith testified that they try to log all occurrences, but if there is considerable activity among the inmates, often the guards are unable to make these entries.

The next day when Sgt. Smith checked the plaintiff he discovered that McCray had defecated in a cup, and smeared this waste throughout the cell. Smith then

notified the psychologist, Mr. Musk, and decided to retain McCray for an additional day. While it appears that Mr. Musk may not have examined the plaintiff before he was removed from the I.C. area, it is possible that this may have been due to the fact that November 21st was a Sunday. Mr. Musk testified that he did not recall talking to McCray about this specific incident, nor did he have a record of such a meeting. However, it was brought out during his testimony that he had spoken to the plaintiff on at least ten occasions, and he had made a record of only four of these visits.

Plaintiff also alleged that he was not given any showers during the two days that he was confined in I.C., but the records introduced at the trial clearly indicated that he was given a shower on November 20, 1971.

The incident that is the basis for McCray's suit against Captain Burrell occurred on January 1, 1972. The plaintiff had been placed in Cell #325 on the South Wing on December 31, 1971 sometime between 6:00 and 7:00 p.m. The defendant was a correctional officer and a duty captain whose responsibility was the operation and administration of the entire Penitentiary on the 8 a.m. to 4 p.m. shift.

Plaintiff had been placed in cell #325 by Officer Fazzio, and it appears that the cell had not been cleaned since the departure of the last occupant. There was paper, dirty blankets, a metal locker and other trash lying on the floor. The plaintiff requested that the cell be cleaned up, but was informed that it was too late in the evening. McCray then swept the trash in front of his cell door to be pushed out into the tier the following day.

At approximately 9 a.m. on January 1st he borrowed a cigarette and a light from the inmate in the adjacent cell, even though he testified that he usually does not smoke. The plaintiff alleged that he dozed off with the lit cigarette in his hand, and when he awoke the cell was filled with smoke. He testified that he did not set the fire intentionally, but he was charged with

purposely causing the fire. Plaintiff stated that he jumped from bed and attempted to stamp out the fire, and when this failed he tried to smother the blaze with the mattress, but this merely worsened the situation.

He then took a bucket that was in the cell and tried to carry water from the sink to douse the fire. The bucket, however, would not properly fit under the sink to allow plaintiff to fill it sufficiently for it to be useful. He then used the metal cabinet which was lying on the floor of the cell to first break the sink and then the toilet in alleged efforts to allow the water to flow more freely. When these attempts failed he covered his head and body with water.

The guards, in the meantime, had attempted to put out the fire but the fire extinguisher did not work properly. After a short period of time, they procured a second extinguisher and managed to put out the fire.

The plaintiff testified that he had suffered burns to his hands and face, but the testimony of the nurse on duty at the time of the fire, Mrs. Weber, and the dispensary records, revealed that there were no blisters or serious burns evident. She stated that when the plaintiff was brought into the infirmary he was arrogant and initially refused to allow Officer Martin to apply cold compresses to the areas that he complained had been burned. However, the officer was finally able to apply the compresses and bacitracin ointment to his burns. His eyes were irrigated and his ears were washed out. Mrs. Weber, according to the testimony of the plaintiff, then recommended that he be placed in a locked cell. Captain Burrell ordered that he be placed in the Mental Observation area (M.O.). Captain Burrell testified that he issued this order because he had been informed that the plaintiff had intentionally set the fire, and, since this was not a rational act, he believed that the inmate was mentally unstable. Captain Burrell made a reasonable determination from the circumstances at the time. Having done this he decided, for the safety of the other inmates and the plaintiff, to place McCray in M.O. without clothes or a mattress. He

testified that whenever he had reason to believe that an inmate might try to injure himself he removed from the cell any items that could be used for this purpose.

The plaintiff was allowed to remain in the M.O. area for approximately forty-eight hours, from January 1-3, 1972. It does not appear that he was visited by a medical doctor, nurse, or a psychologist during this interval. It is important to note that shortly after the plaintiff was treated in the dispensary, Nurse Weber contacted Dr. Holljes and advised him that the patient had been placed in M.O. She also attempted to contact a Dr. Stewart but was unable to reach him. The records introduced indicated that the plaintiff was next seen by a physician, a Dr. Wood, on January 4, 1972.

On January 13th the plaintiff was examined by Dr. Gould, who testified that at this time he noticed several crusted sores on McCray's cheeks, ears, a small amount on his back (which the plaintiff did not remember until questioned on cross-examination), and some sores on his knuckles. Dr. Gould further testified that the application of cold compresses and an antibiotic ointment, similar to the type applied to the plaintiff by Officer Martin, was the appropriate treatment to be employed. While he stated that this treatment should have been continued for a period of time, he could not say that it was inadequate.

Although no testimony was given to explain why a psychologist did not examine the plaintiff during his confinement in the M.O. area, it is evident to this Court that the New Year's holiday weekend was a contributing factor. Captain Burrell mentioned during his testimony that the Penitentiary was shorthanded at this time, a factor he considered when he decided to place the plaintiff in the M.O. area.

The plaintiff contends that the procedures employed by both defendants were disciplinary in nature, and that they violated his right to due process of the law. He asserts that the requirements of due process were not satisfied when the defendants failed: (1) to give him adequate notice of the charges; (2) a hearing before a

relatively objective tribunal, and (3) an opportunity to respond to or explain the alleged offenses.

It is true, as the plaintiff points out, that when a prisoner is subjected to substantial deprivations, they should be premised on a rational determination of facts. *See* Sostre v. McGinnis, 442 F.2d 178, 198 (2d Cir. 1971), cert. den. 404 U.S. 1049, 92 S. Ct. 719, 30 L. Ed. 2d 740 (1972). However, this Court disagrees with the allegations that the defendants transferred the plaintiff to an isolated area for disciplinary reasons. Rather, the testimony was quite clear in both cases that McCray had caused substantial disturbances, and he had been removed to avoid the possibility of continued disruptions that might involve substantial portions of the South Wing. It is important to bear in mind that the Maryland Correctional System, like many others, has been plagued by considerable prisoner unrest. While this Court is not absolving the prisons of all responsibility for this problem, it is clear that a prison correctional officer must be concerned with avoiding situations which could ignite a riot. This was the principal factor considered by the defendants in placing the plaintiff in an isolated cell.

In both cases, once the decision to isolate the plaintiff was made, the defendants were faced with a dilemma. Sgt. Smith had to determine if the plaintiff's outburst was merely a way of venting his fustrations, or whether he was in such a frame of mind that he would actually attempt to harm himself. Captain Burrell's task was certainly no easier. Once he concluded that McCray may have set his cell on fire intentionally, a conclusion undoubtedly buttressed by the guards' reports and the fact that the plaintiff did not ordinarily smoke, the defendant Burrell had to determine if the plaintiff would continue to act in a dangerous and disruptive manner. Since the deliberate setting of a fire was not only dangerous to the other prisoners, but to the plaintiff as well, he had to be sure that McCray could not attempt to injure himself in some other way.

To require a prison official to refrain from isolating an inmate until a due process hearing can be held to

determine if the prisoner might attempt to harm himself, and still subject the official to liability for not controlling the actions of that particular inmate, is totally unreasonable. Such a standard of conduct would lead to the resignation of many competent guards, and would deter others from pursuing this occupation as a career. The net result would be an everincreasing manpower shortage in our correctional systems, a problem that is already a major problem.

Captain Burrell and Sgt. Smith both stated that it was standard operating procedure, when confronted with an inmate exhibiting an irrational state of mind, to strip him of his clothes and remove the mattresses. While this procedure obviously caused the plaintiff considerable discomfort, it was certainly reasonable for the defendants to opt for this alternative rather than to risk the chance that the plaintiff might use these items to harm himself. Neither Sgt. Smith nor Captain Burrell had any other choice but to place McCray in an isolated cell for the security of the Penitentiary, and it was necessary to remove all of his clothes and the mattresses from the cell for his own safety.

While, ideally, it may be preferable to remove a prisoner placed in isolation for nondisciplinary reasons after a few hours, in these two cases such a course of action did not appear to be feasible at the times involved. When Sgt. Smith ordered the plaintiff removed from his cell on the South Wing, McCray reacted violently. After a night in the isolated confinement area, Sgt. Smith discovered that he had defecated and smeared his waste about the cell. Under an Administratvie directive issued on August 10, 1970 by the Deputy Commissioner of the Department of Correctional Services, James Jordan, in the absence of a psychologist/psychiatrist, an inmate may be placed in an isolation cell for his own safety, or that of the inmate population, when he displays mentally disturbed behavior. Such behavior was clearly present in the instant case. The directive further provides that a psychologist/psychiatrist be immediately notified after the confinement, and the inmate should be evaluated

within a twenty-four hour period. While Sgt. Smith may not have followed this directive to the letter, he did notify the psychologist the following morning, Sunday, November 21, 1971, when he discovered that the plaintiff had smeared defecation about his cell. He then ordered the cell cleaned and scrubbed, and after another day of observation he had McCray returned to the third tier of the South Wing.

In the case involving Captain Burrell, the plaintiff was confined in isolation in the Mental Observation area for forty-eight hours. This incident not only occurred during the New Year's Day holiday period, a time when a substantial portion of the prison staff was on leave, but had endangered the lives of every inmate confined on the South Wing. Thus, the most pressing matter facing the defendant was the protection of the other inmates. Confronted with a skeleton crew of guards, his only alternative was to separate the plaintiff from the rest of the inmates until his staff returned to its normal strength on Monday, January 3rd. It also appears that the decision to deprive the plaintiff of his clothes and a mattress during the entire forty eight hour period may have stemmed from the unavailability of a psychologist who could examine and evaluate McCray's condition.

None of these events constituted an arbitrary and capricious punishment of the plaintiff. In neither case was he removed from the South Wing as a disciplinary measure, but rather as a security precaution. The plaintiff's clothing and mattress were removed in both cases when he was placed in an isolation cell, in a reasonable attempt to prevent him from injuring himself. The length of time that he remained in isolated confinement was not unreasonable under the circumstances in either case. The fact that the plaintiff was not examined by a psychologist on either occasion was not a result of neglect by the defendants, but appears to have been caused by the unavailability of such personnel during the weekends in question. The Court thus concludes that Sgt. Smith and Captain Burrell did

not arbitrarily impose a punishment upon the plaintiff in violation of his right to due process, but rather they were attempting to take reasonable precautionary measures to insure the safety of the plaintiff and the other inmates of the Penitentiary.

The plaintiff further contends that the condition of the cells and the lengths of time that he was confined constituted cruel and unusual punishment in violation of the eighth amendment. While the conditions of the cells were by no means luxurious, and his confinement undoubtedly unpleasant, this Court does not find that it constituted cruel and unusual punishment. When testifying on his own behalf against Sgt. Smith, the plaintiff admitted that when he discovered the condition of the first cell in which he was placed on the South Wing he "really started to perform." He also testified that he had, in fact, "hollered" long and loud when he did not immediately receive his legal materials. Once Sgt. Smith ordered the plaintiff removed from his cell and placed in the I.C. area, it appears that the plaintiff indicated he intended to do bodily harm to himself. Since Sgt. Smith had met McCray for the first time that same day, it was reasonable under the circumstances that he remove all items from the cell that could be used by plaintiff to carry out his stated intention.

Captain Burrell ordered the plaintiff confined in the Mental Observation area without clothing and without a mattress for similar reasons. The defendant testified that the intentional setting of a fire in one's cell was clearly an irrational act, and it is standard operating procedure at the Penitentiary to place an inmate in an isolated cell without clothes or a mattress when he exhibits an unstable state of mind.

The confinement of the plaintiff in both cases for forty-eight hours was not an unreasonable period when one considers the surrounding circumstances in each case. Sgt. Smith returned the next morning to find that the plaintiff had smeared defecation in his cell. This demonstrated a somewhat less than stable condition, and an additional twenty-four hours in isolation

without clothes appears to have been warranted. Captain Burrell was faced with an inmate who had attempted to burn his cell, and possibly the entire South Wing. The Penitentiary was operating at this time with a skeleton crew, and did not return to its normal strength until January 3, 1972, the day the plaintiff was released from the M.O. area.

The physical aspects of the cells in the isolated cell area and the mental observation area (which are substantially the same) are primitive at best. However, it is significant that the plaintiff candidly admitted on several occasions he had requested to be placed in the I.C. area because it was more conducive to preparation of legal papers. While it is true that he was fully clothed on these later visits to I.C., it does indicate that the conditions of the cells were not intolerable.

The Court concludes that the defendants' actions were not excessive exercises of authority beyond the limits of civilized standards of decency. *See* Trop v. Dulles, 356 U.S. 86, 100-101, 78 S. Ct. 590, 2 L. Ed. 2d 630 (1958). Nor were they intended as punishment for the plaintiff's conduct, but, as has been repeatedly stated, they were employed as precautionary measures. The removals of the plaintiff from his cell on the South Wing to isolated cells were not pointless impositions of suffering, nor was there a less severe alternative that would have achieved the purposes for which the confinement was imposed. Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 2747, 33 L. Ed. 2d 346 (1972).

[7] While the plaintiff asserts correctly that punishments which are not *per se* cruel and unusual may become so if they are disproportionate to the offense committed, such is not the case here. He cites LaReau v. MacDougall, 473 F.2d 974, 978 (2d Cir. 1972) for the proposition that confinement in a strip cell, even for short durations of time, falls "below the irreducible minimum of decency required by the Eighth Amendment." However, that case is distinguishable from the ones before this Court. In *LaReau* the prisoner was found in possession of contraband materials. Pursuant

to prison regulations he was punished by the imposition of an indeterminate sentence, and he served five days in isolation. The finding there of cruel and unusual punishment by the Second Circuit appears to have been premised upon the fact that the punishment was disproportionate to the offense committed, and that a less severe punishment would have adequately achieved the purposes for which the punishment was imposed. Such is not the case here. The plaintiff was not confined as a punishment. He was isolated for his own protection and that of the other inmates. He was not confined any longer than was necessary to insure this protection. The placement of the plaintiff was not unreasonable in light of his conduct, nor was there a less severe alternative available to the defendants.

[8] The allegation made in Civil Action No. 72-68-N, that Captain Burrell caused the plaintiff to be denied adequate medical care, is totally without merit. He was taken directly to the dispensary for treatment after the fire was placed under control. The treatment received by the plaintiff was shown to be the appropriate care for the type of injuries that he had allegedly received. Any failure of the medical staff to diagnose the extent of the injuries was directly attributable to the plaintiff's conduct. When he first arrived at the dispensary he was arrogant and refused any treatment. It was due only to the perseverance of Nurse Weber and Officer Martin, and their willingness to spend four times the normal length of time treating the prisoner, that he received any medication at all. Once he was placed in the mental observation area, Nurse Weber contacted Dr. Holljes and informed him of the incident, plaintiff's complaints, the extent of his injuries as she perceived them, and the treatment administered to him. Dr. Holljes instructed her to contact Dr. Stewart, which she unsuccessfully attempted to do. She testified that she did not continue in her efforts to reach Dr. Stewart because at 2 p.m. that same day there were no complaints from the plaintiff. In addition to this treatment, Mr. Musk, a psychologist for the Penitentiary, testified that he saw the plaintiff the week of January 4th concerning the incident.

Even if the plaintiff had not received this care, the Court does not see how Captain Burrell could possibly be held liable. His unrefuted testimony was that he was responsible for the control and security of the hospital, but not for its operations. Clearly, if the plaintiff was not treated properly by the medical staff, which the Court emphasizes was not the case, this could not be attributed to the defendant.

[9] The defendants in these cases also have available to them the defense of reasonable good faith that their actions were constitutionally permissible. Landman v. Royster, 354 F. Supp. 1302, 1317 (E.D. Va. 1973). The applicability of this defense to damage actions brought by a prisoner under § 1983 was recently recognized by the United States Court of Appeals for the Fourth Circuit in Skinner v. Spellman, 480 F.2d 539 (4th Cir., 1973). In that case the Court held that if the defendant could show he was acting in reasonable good faith reliance on standard operating procedure, he would not have to respond in damages.

In Civil Action No. 72-234-N, the testimony established that the plaintiff was causing a disturbance on the South Wing, and that the other inmates requested he be removed. It was also brought out in the cross-examination of Sgt. Smith that he had the authority to place an inmate in the I.C. area, and that after such action he was to immediately notify his immediate superior. There was no evidence introduced which would lead this Court to believe that Sgt. Smith had not notified his superior. The defendant Smith also stated there was a verbal understanding on the South Wing that an inmate was not to be kept in isolation for more than three days. This procedure was followed in this case.

In Civil Action No. 72-68-N, Captain Burrell followed an Administrative directive when he confined the plaintiff in the Mental Observation area after the latter apparently started a fire in his cell. Defendant stated

that it was a normal operating procedure to remove the clothes of a prisoner who had exhibited an unstable mental and emotional state.

Therefore, since the defendants, as shown from all the facts, acted in good faith in exercising their discretion, Bennett v. Gravelle, 323 F. Supp. 203, 214 (D. Md. 1971), they are immune from suit under 42 U.S.C. § 1983.

For the reasons stated herein, it is this 16th day of October, 1973, ordered:

1. That the defendants' Motions to Dismiss in Civil Actions Nos. 72-68-N and 72-234-N be, and the same hereby are, granted;

2. That plaintiff's claim for relief in Civil Action No. 72-68-N be, and the same is, denied; and

3. That the plaintiff's claim for relief in Civil Action No. 72-234-N be, and the same hereby is, denied.

APPENDIX A

Habeas Corpus and 42 U.S.C. § 1983 Civil Rights Suits Filed by Milton McCray in the United States District Court for the District of Maryland

1. Milton McCray v. State of Maryland (H/C) — 15745/62

Suits filed in 1970 (9)

2. Milton McCray v. Forrest Calhoun, Jr. (C.R.) — 70-164-W

3. Milton McCray v. Director Patuxent Institution, et al. (C.R.) — 70-634-N

4. Milton McCray v. State of Maryland (C.R.) — 70-1047-N

5. Milton McCray v. Eva Sacks (C.R.) — 70-1064-N

6. Milton McCray v. State of Maryland (H/C) — 70-1407-N

7. Milton McCray v. John O. Rutherford, Clerk of the Baltimore City Court (C.R.) — 70-1409-N

8. Milton McCray v. Mr. Calhoun, et al. (C.R.) — 70-1410-N

9. Milton McCray v. Mr. Boslow, etc. (C.R.) — 70-1411-N

10. Milton McCray v. Mr. James A. Hall (C.R.) — 70-1412-N

Suits filed in 1971 (9)

11. Milton McCray v. Patuxent Institution (C.R.) — 71-184-N

12. Milton McCray v. Mr. Calhoun (C.R.) — 71-237-N

13. Milton McCray v. Dr. Boslow and Staff (C.R.) — 71-238-N

14. Milton McCray v. Dr. Boslow, et al. (C.R.) — 71-239-N

15. Milton McCray v. Judge Sklar, et al. (C.R.) — 71-240-N

16. Milton McCray v. Hon. Judge A. Sklar (C.R.) — 71-552-N

17. Milton McCray v. Director Patuxent Institution (H/C) — 71-991-N

18. Milton McCray v. Honorable Judge Sklar, etc. (C.R.) — 71-1200-N

19. Milton McCray v. Warden Maryland Penitentiary (C.R.) — 71-1395-N

Suits filed in 1972 (14)

20. Milton McCray v. Warden of Maryland Penitentiary (C.R.) — 72-68-N

21. Milton McCray v. Warden of Maryland Penitentiary (C.R.) — 72-69-N

22. Milton McCray v. Sergeant V. D. Smith (Badge No. 153), Maryland Penitentiary — (C.R.) — 72-234-N

23. Milton McCray v. L. R. Mooney, et al. (C.R.) — 72-463-N

24. Milton McCray v. Warden Maryland Penitentiary (C.R.) — 72-483-N

25. Milton McCray v. Mr. M. Hawkins, Warden Maryland Penitentiary (C.R.) — 72-484-N

26. Milton McCray v. Paul R. Schlitz (C.R.) — 72-485-N

27. Milton McCray v. Mr. Horowitz, States Attorney (C.R.) — 72-521-N

28. Milton McCray v. Patuxent Institution (C.R.) — 72-661-N

29. Milton McCray v. Francis B. Burch, Attorney General of Maryland, et al. (C.R.) — 72-783-N

30. Milton McCray v. Director of Patuxent Institution (C.R.) — 72-918-N

31. Milton McCray v. Off. Butterworth, et al. (C.R.) — 72-919-N

32. Milton McCray v. Warden Maryland Penitentiary, et al. (C.R.) — 72-1119-N

33. Milton McCray v. Warden Maryland Penitentiary, et al. (C.R.) — 72-1139-N

34. Milton McCray v. Mr. Gerald McClellan, Warden, et al. (C.R.) — 72-1172-N

Suits field in 1973 (3 as of 4/5/73)

35. Milton McCray v. State of Maryland Officials (C.R.) — 73-55-N

36. Milton McCray v. Mr. Richard Kinlein (C.R.) — 73-89-N

37. Milton McCray v. Mrs. Tucker Maryland Penitentiary, et al. (C.R.) — 73-269-N

APPENDIX B

In The United States District Court
for Maryland

Civil 72-69-N

Milton McCray 110563
v.
Warden, Md. Pen.

SUIT

To the Honorable Judge of said Court.

Petitioner, Milton McCray, and Officer Furrell of Md. Penitentiary had a pornography business going in the institution which profited them an average of seventy dollars a week. Because Officer Furrel did not know how much money petitioner was making he received between $15 to $20 a week or approximately $80 to 90 dollars a month.

HOW THE MONEY WAS MADE

Pornography and sex books are prohibited in this institution therefore are in great demand by the inmate. Because of petitioner connection and reliable source Officer Furrel he had, at the time Mr. Furrell set him up to be caught, over fifty very good sex books.

Petitioner Rent said book for 2, 3, or 5 packs a night averaging 7 to 8 cartons a night which are sold to the inmates at 4 packs for a dollar bring $15 or more in cash per night.

When petitioner was set up, Mr. Furrell and officers unknown went into petition's cell while he was working on Dec. 16, 1971 broke into petitioners locker, which was unnecessary since all they had to do was call petitioner and request the key, took (23) twenty-three sex books and ($275) two hundred and seventy-five dollars and (95) ninety-five packs of cigarettes.

When petitioner returned to his cell the door was open and all his valuable were gone either the officers had taken them or the inmate as a result of the officers, Mr. Furrell deliberately and spitefully leaving petitioners cell door open had taken them.

Petitioner immediately reported what had happened to his cell to the officer in charge who sent him to the major office.

Petitioner explained what had happened to the major who refused to investigate the matter properly. Petitioner requested that something be done about his property. Major Mills ordered petitioner locked in the hole. Four officer grab petitioner and when petitioner resisted the unexpected and brutal treatment he was beat cruelly with fist and magazines and thrown in the hole nude.

Petitioner was charged and tried but because petitioner had taped two of the business conversation the charges were dismissed.

PETITIONER CONTEND

(1) That Mr. Furrell and officers had no right in petitioners cell without petitioner being present and a supervisor.

(2) That Mr. Furrell and officers had no right burglarizing petitioner locker (breaking lock) when all they had to do was request key from petitioner.

(3) That the following personal property was stolen or confiscated.

1) One set of law books	$ 50.00
2) One box of daily record papers	$200.00
3) One lock (cost 15 packs)	$ 5.00
4) 15 cassettes a $9 each	$135.00
5) 95 packs of cigarettes	$ 35.00
6) $275 in cash	$275.00
7) 2 mens watches	$185.00
8) 11 pair of silk underwear	$ 77.00
9) One cassette taperecorder	$ 50.00
10) One suit	$ 85.00
11) One shoes	$ 35.00
12) 6 shirts	$ 75.00
13) 1 leather jacket	$ 85.00
14) One AC triple jack adapter	$ 9.00
15) One microphone	$ 15.00
16) 7 pair of socks	$ 18.00
17) 3 pair of pants	$ 60.00
18) 23 sex books	$ 70.00

(4) That the institution admit to the lost of

1) 1 pair of pants	$ 20.00
2) 1 leather jacket see no. 13 above	$ 85.00
3) 1 shirt	$ 16.00
4) 2 cassettes tape $1000.00 because they contained the taped conversation between petitioner and officer Furrell.	

Wherefore petitioner pray that this Honorable Court will grant him $500,000 in damages etc. for Mr. Furrell's and officers deliberate and spiteful negligence in leaving his cell open and for the confiscation of petitioners personal property.

s/ MILTON MCCRAY,
Petitioner.

I, Milton McCray, hereby certify that due to my poverty I am unable to pay the cost of this proceeding or give security therefor.

s/ MILTON MCCRAY.

APPENDIX C

In the Court of Maryland United States District

Civil 72-67-N

January 13, 1972

Milton McCray 110563
v.
Warden Md. Penitentiary

SUIT

To the Honorable Judge of Court.

On January 1, 1972 petitioner, Milton McCray's cell caught on fire, resulting from a lit cigarette falling from his hand into some paper while he was asleep. When he woke up his cell was blazing.

A officer ran up to the door with a fire extinguisher but nothing would come out.

PETITIONER CONTEND

1. That the officer deliberately bought the empty fire extinguisher to his door knowing that it was empty. He could not help but know it was when he picked it up.

2. That said officer after finding out that said extinguisher was empty ran away and stayed for an eternity. The fire extinguisher being empty almost cost petitioner his life.

3. That the officers deliberately took their time putting the fire out, causing him to suffer first degree

burns on the face, ears, hand, and arms. He is also having lung trouble.

4. That he has been denied medical treatment for two weeks.

5. That he has been laying on the floor suffering for over two weeks because no doctor would treat him.

6. That each doctor that saw him referred him to another doctor therefore no treatment was received, administered.

7. That because of the doctors deliberate spiteful and unprofessional negligence petitioner has suffered much pain.

8. That because of the deliberate negligence of the persons responsible the empty fire extinguisher has caused petitioner to suffer unnecessarily.

Wherefore petitioner pray that this Honorable Court will award him his immediate release and $500,000 in damages.

s/ MILTON MCCRAY

I, hereby, certify due to his poverty, he is unable to pay the cost of this proceeding or give security therefor:

s/ MILTON MCCRAY

APPENDIX D

In the Superior Court of
Baltimore City

June 25, 1973

Milton McCray
v.
Warden of Maryland Penitentiary

DECLARATION

To the Honorable Judge of said Court:

On January 1, 1972, petitioner, Milton McCray's cell caught on fire resulting from a lit cigarette falling from his hands into some paper while he was asleep. When he awakened his cell was blazing. A officer ran to McCray's cell door with a fire extinguisher but nothing came out. The officer ran away. He refused to open the cell door to let petitioner out of the burning cell.

PETITIONER CONTEND

(1) That the defendant's, Warden and staff, lack of proper care and attention to the rules and laws governing fire extinguishers and fire control has caused him injury, pain and suffering.

(2) That the defendant's failure to properly inspect and immediately refull the institutions fire extinguishers pursuant to rules and laws governing fire extinguishers and fire control has caused him to suffer first degree burns of the face, ears, hands and back.

(3) That the defendant's carelessness and indifference to their duties and responsibilities concerning fires in inmates cells and fire control within the institution

has caused him great injury, pain, suffering and mental anguish.

Wherefore petitioner claims $50,000 compensative damages and 75,000 punitive damages.

Petitioner respectfully requests a Jury Trial.

s/ MILTON MCCRAY,
954 Forrest Street,
Baltimore, Maryland

John Washington

v.

Dr. Harold M. Boslow, Director Patuxent Institution,

and

Dr. Domingo C. Sorongon, M.D., Patuxent Institution.

Civ. No. 73-1025-N.

United States District Court, D. Maryland.

May 17, 1974.

As Amended May 22, 1974.

[*375 F. Supp. 1298 (D. Md., 1974)*]

Charles F. Morgan, Baltimore, Md., for plaintiff.

Francis B. Burch, Atty. Gen. of Maryland, John P. Stafford, Jr., and Donald R. Stutman, Asst. Attys. Gen., for defendants.

NORTHROP, Chief Judge.

John Washington, an inmate at the Patuxent Institution for defective delinquents, brings this action pursuant to 42 U.S.C. §1983 (1970) against Harold M. Boslow, Director of Patuxent Institution, and Dr. Domingo C. Sorongon, staff physician at Patuxent Institution, alleging that the defendants failed to provide the plaintiff with proper medical care in violation of the eighth and fourteenth amendments to the U.S. Constitution. For relief, the plaintiff requests that this Court (1) enter a judgment declaring that the defendants' acts, policies, and practices contravene the plaintiff's constitutional rights and (2) enter a judgment awarding compensatory and punitive damages. The defendants have moved to dismiss the instant suit on the sole ground that under this Court's opinion in McCray v. Burrell, 367 F. Supp. 1191 (D. Md. 1973) (hereinafter referred to as *McCray*), a prisoner must exhaust the state administrative remedies provided by the Maryland Inmate Grievance Commission Act, Md. Ann. Code art. 41, § 204F (Supp. 1973), before he can maintain an action under §1983, and the plaintiff has not complied with this requirement. In response, the plaintiff contends that under existing case law there is no requirement of exhaustion of state administrative remedies in §1983 suits. Even if there is such a requirement, the plaintiff argues that he need not resort to the Inmate Grievance Commission because this remedy is inadequate since, among other relief, he seeks a monetary award, because he will be deprived of his jury trial right, and because the Commission does not accord him a full and fair hearing.

I.

[1] In *McCray*, this Court made a thorough analysis of the case law under section 1983 and found that this judicial precedent did not preclude requiring exhaustion of state administrative remedies where the administrative proceedings provide a fair and adequate remedy. *McCray*, 367 F. Supp. at 1196-1201, 1209-1210. This

Court adheres to the principle of *McCray* and finds no reason to alter its opinion in that case. The recent Supreme Court case of Steffel v. Thompson, 415 U.S. 452, 94 S. Ct. 1209, 39 L. Ed. 2d 505 (1974), cited by the plaintiff, is inapposite. While the Court in *Steffel* did state at one point that "[w]hen federal claims are premised on 42 U.S.C. § 1983 . . . we have not required exhaustion of state judicial or administrative remedies . . ." (94 S. Ct. at 1222), the factual and legal setting for this statement differs markedly from the instant case. The only question addressed by the Supreme Court was whether under Younger v. Harris, 401 U.S. 37, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971) and Samuels v. Mackell, 401 U.S. 66, 91 S. Ct. 764, 27 L. Ed. 2d 688 (1971), "declaratory relief is precluded when a state prosecution has been threatened, but is not pending, and a showing of bad faith enforcement or other special circumstances has not been made." 94 S. Ct. at 1213. Since exhaustion will be required by this Court, the only remaining issue is whether the Inmate Grievance Commission Act in the instant case accords the plaintiff a fair and adequate remedy.

[2] The plaintiff finds inadequacy in several areas of the Inmate Grievance proceedings. The plaintiff first asserts that the inability of the Commission to award damages is a fatal flaw to its effectiveness. A short answer to this contention would be that the plaintiff seeks both equitable and legal relief in this suit and, as stated in *McCray*, 367 F. Supp. at 1208-1210, the Inmate Grievance Commission has been invested with powers comparable to the equity power of a federal court, and the prisoner will not be prejudiced by delaying an award of damages until the Inmate Grievance procedures have been exhausted. This Court, however, has gone one step further. If the only relief requested is an award of damages, the Inmate Grievance Commission Act still provides an adequate remedy to the prisoner. "The claim for monetary damages is inextricably tied to prison regulations and disciplinary procedures." *McCray*, 367 F. Supp. at 1210. Even though the prisoner may not assert it, there is an ever-present possibility

that the conditions giving rise to the prisoner's claim for damages may still exist and go uncorrected if the prison authorities are not fully apprised of them. Dene L. Lusby, Executive Director of the Inmate Grievance Commission, stated in his deposition of February 28, 1974 in this case, that when a grievance requesting only damages is filed, a hearing is held for the purpose of, *inter alia*, determining the validity of the claim. If the grievance is meritorious in whole or in part, the Commission would then recommend procedures designed to prevent a recurrence of the situation.

If the specific condition producing the harm will not happen again, the Inmate Grievance procedures still perform a vital function in the overall process of securing a damage award. "The Maryland Inmate Grievance Commission provides a forum with built-in judicial review which can more expertly sort out the meritorious from the frivolous . . . [and] having taken this route the complaining prisoner can come to this Court with the issue of liability clearly defined on the record." *McCray*, 367 F. Supp. at 1210. While a determination of the Grievance Commission or the state courts on the merits of a prisoner's claim is not binding on this Court, a preliminary indication of validity serves as a valuable aid to a federal court. With 103 prisoner civil rights cases presently pending in the District of Maryland, a meritorious claim, of which there are few, in all likelihood cannot possibly be processed as rapidly as the State grievance procedure. Initial action by the Inmate Grievance Commission serves to alert this Court to a case in which constitutional deprivations are likely to have occurred, and this Court can move the case into its regular trial calendar.

A reasonably expeditious resolution of a prisoner's grievance can then be obtained since this Court will have before it a complete record of the controversy. Each hearing before the Commission is recorded on a Voicewriter and transcribed when an inmate seeks judicial review in the state courts. The transcript, coupled with the findings of the Commission and state courts, can be employed by this court to arrive at the

central issues for trial, thereby significantly reducing the trial time involved.

Thus the relief available from the Inmate Grievance Commission, although not exactly comparable to an award of damages, is critical to the welfare of the inmate, to the proper administration of the correctional institution, and to the expeditious resolution of the inmate's grievance.

[3] The plaintiff next argues that requiring exhaustion of state administrative remedies will deprive plaintiff of his right to a jury trial. At the threshold, this contention assumes that there is a right to a jury trial in a § 1983 suit. Only a few courts have directly addressed this issue, and their conclusions are in conflict. *Compare* Lawton v. Nightingale, 345 F. Supp. 683 (N.D. Ohio 1972) *with* Cook v. Cox, 357 F. Supp. 120 (E.D. Va. 1973). If there is a right to a jury trial, this Court fails to see how resorting first to the Inmate Grievance Commission will prejudice a prisoner's jury trial right. These administrative proceedings will not estop the plaintiff from having those issues appropriate for jury resolution fully tried before a jury.

[4] The plaintiff last asserts that the Inmate Grievance Commission Act does not accord the plaintiff a full and fair hearing within the meaning of the due process clause. In *McCray*, this Court discussed extensively the Inmate Grievance procedures and found that these procedures satisfied the requisites of due process. The plaintiff argues here, however, that at a hearing before the Commission he is unreasonably restricted in his ability to call and cross-examine witnesses and subpoena documents, and that he is unable to engage in pre-trial discovery. An inmate has the right to call a reasonable number of witnesses, subject only to the discretion of the Commission as to the relevancy or cumulative nature of the testimony, and this discretion cannot be unreasonably exercised by the Commission. Md. Ann. Code art. 41 § 204F(h) (Supp. 1973). Any unreasonable refusal to allow an inmate to call a witness is reviewable in state court.

Again, the inmate has a right to subpoena documents, and this right is subject only to the Commission's determination of the usefulness of the documents in deciding the merits of the claim. Public Safety and Correctional Services R. 12.07.00.04(2) (Inmate Grievances). This right may not be unreasonably restricted by the Commission, and any such action is reviewable in state court. While the plaintiff does not have the right to full pre-trial discovery, he has not cited to any case that holds discovery to be an essential element of due process. This Court finds that the lack of full discovery does not render the hearing "unfair." *Cf.* Goldberg v. Kelly, 397 U.S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970).

[5] The broad authority of the Secretary of the Maryland Department of Public Safety and Correctional Services to review the orders of the Inmate Grievance Commission is also attacked as violative of the plaintiff's due process rights. Specifically, the plaintiff states that the Secretary, in deciding whether to affirm, modify, or reverse the Commission's order, is able to go outside the record and consider additional evidence. The plaintiff, however, has cited to only one case in which the Secretary actually employed new evidence in his decision. That case, in re Midgett, Minnick & Minnick, I.G.C. #1295, #1282 (consolidated), involved a riot at the Maryland Penitentiary that occurred after the decision of the Grievance Commission and rendered compliance with the Commission's order impossible. In his deposition, Secretary Robert J. Lally, clearly indicated that only in those circumstances where it is impossible to carry out the Commission's recommendations is the order modified or reversed based on information outside of the record. In all other cases the Secretary will remand for the taking of further evidence.

If the Secretary could exercise his authority in any other manner prejudicial to a full and fair hearing, a representative sampling of his actions in reviewing the Commission's orders indicates that he has not done so in practice. From November 19, 1973 to February 20,

1974, 33 prisoner complaints were found meritorious in whole or in part by the Commission. Of that number 31 have been reviewed by the Secretary with the following results: 28, or over 90% were affirmed without modification; 3, or less than 10%, were affirmed as modified; and *none* were reversed. Any future disposition of the Secretary to act in an arbitrary manner is inhibited by the review available in state court. Where in Toney v. Reagan, 467 F. 2d 953 (9th Cir. 1972), a University President had the power to overrule the recommendation of a faculty committee on rehiring, the grievance procedure for teachers who were not rehired was not inadequate, because there was a carefully constructed appeal to the Chancellor's Review Committee, and this appeal was a reasonable check against an arbitrary decision of the President.

In sum, this Court, after a second look, finds that the Inmate Grievance Commission Act provides a fair and adequate remedy to the plaintiff. The inability of the Commission to award damages is not fatal to the efficacy of its remedy. In deed, the Act furthers the inmate's claim appreciably by alerting this Court to a meritorious grievance and by providing a record of the proceedings. At the hearing before the Commission the inmate is accorded all of the procedural rights mandated by the due process clause. The Secretary's review authority also does not contravene due process since in practice he has not exercised this authority in an arbitrary or prejudicial manner, and any inclination to do so is checked by the availability of state judicial review.

II.

This case is a good example of the type of complaint which should be subject to the Inmate Grievance Commission screening so that it may be determined whether any acts, policies, or practices of prison personnel in any way violated this inmate's constitutional rights as articulated in 42 U.S.C. § 1983. If they were not, this suit, at best, is a straight tort action

medical malpractice which belongs in a state court. It is difficult for this Court to believe that Section 1983 jurisdiction should be extended to such an action. It would, in effect, give an inmate a right to resort to the federal courts beyond that of an individual citizen of a state. If, on the other hand, the claim is a meritorious one under Section 1983, the state procedure would sharpen the issues and furnish a record which, if necessary, could be supplemented in this U. S. District Court on the damage claim.

Most importantly, the State would have had the first opportunity to put its prison in order.

The United States Supreme Court recognized this "paramount state interest" in Preiser v. Rodriguez, 411 U.S. 475, 93 S. Ct. 1827, 1837-1838, 36 L. Ed. 2d 439 (1973).

> It is difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons. The relationship of state prisoners and the state officers who supervise their confinement is far more intimate than that of a State and a private citizen. For state prisoners, eating, sleeping, dressing, washing, working, and playing are all done under the watchful eye of the State, and so the possibilities for litigation under the Fourteenth Amendment are boundless. What for a private citizen would be a dispute with his landlord, with his employer, with his tailor, with his neighbor, or with his banker becomes, for the prisoner, a dispute with the State. Since these internal problems of state prisons involve issues so peculiarly within state authority and expertise, the States have an important interest in not being bypassed in the correction of those problems. Moreover, because most potential litigation involving state prisoners arises on a day-to-day basis, it is most efficiently and properly handled by the state administrative bodies and state courts, which are, for the most

part, familiar with the grievances of state prisoners and in a better physical and practical position to deal with those grievances. In New York, for example, state judges sit on a regular basis at all but one of the State's correctional facilities, and thus inmates may present their grievances to a court at the place of their confinement, where the relevant records are available and where potential witnesses are located. The strong considerations of comity that require giving a state court system that has convicted a defendant the first opportunity to correct its own errors thus also require giving the States the first opportunity to correct the errors made in the internal administration of their prisons. [Footnote omitted].

The observations of Judge Ruggero J. Aldisert, United Stated Circuit Judge of the U. S. Court of Appeals for the Third Circuit, as set out in *Judicial Expansion of Federal Jurisdiction: A Federal Judge's Thoughts on section 1983, Comity and the Federal Caseload*, 1973 Law & Soc. Order 557, 566-67, (published by the Arizona State University Law Journal) is particularly appropriate in summing up the whole situation:

There is also a point of view which first came to me over a cup of coffee from an experienced and sensitive federal trial judge, whose record proves he has been concerned with protecting the rights of the state prisoners. In discussing this subject, he admitted an abiding concern that, in his efforts to improve the lot of many prisoners, he was actually producing the opposite effect. The judge commented that he was afraid he had been playing warden, but was not sure that he had succeeded well. He remarked that while he thought he had given the prisoners their constitutional rights, he had also crippled prison discipline. The guards were now scared; what is more, they were demoralized. He observed that guards are now taunted,

abused and spat upon that competent personnel are leaving. As a consequence, many of the prisoners are at the complete mercy of other prisoners — toughs and bullies who are having a field day. In short, the judge was very much afraid that the federal judiciary had made a serious mistake. The courts had given birth to something and now could not put the baby back.

Meanwhile prisoners' petitions continue to inundate the federal courts, pathetic, handwritten grievances; some very real; some rather illusory; some with genuine constitutional issues; some merely stating disagreements with administrative decisions. This litigious flood consumes many judicial manhours and challenges the abilities of federal courts to cope with their own calendars. Mr. Justice Powell's recent statement concerning state habeas corpus in the federal system is equally applicable to prisoners' civil rights claims: "The current flood of petitions . . . already threatens — because of sheer volume — to submerge meritorious claims and even to produce a judicial insensitivity to . . . petitioners."[43]

Statistics vividly illustrate Justice Powell's point. In 1966, there were 218 civil rights petitions filed by state prisoners in federal courts. Six years later, in fiscal 1972, there were 3,348 petitions filed. Last year, the percentage increase over the previous year was 19.4 percent. In that same year there were a total of 96,173 civil filings in the federal district courts; of these, 16,267 were prisoner petitions of all kinds. Thus, one out of every six civil cases which came before a district court judge last year was a prisoner petition. We are told that

> if prisoner petitions were dropped from federal court statistics the number of civil cases filed in the first six months of fiscal year 1973 would have been 39,533, only 1.1 percent more than the

[43] Boyd v. Dutton, 405 U.S. 1, 8, 92 S. Ct. 759, 30 L. Ed. 2d 755 (1972) (Powell, J., dissenting).

comparable figure (excluding prisoner petitions) from the last year.[44]

The Freund Committee[45] met this phenomenon with refreshing candor:

> The number of these petitions found to have merit is very small, both proportionately and absolutely. But it is of the greatest importance to society as well as to the individual that each meritorious petition be identified and dealt with. And yet it seems a misallocation of resources to impose the burden of sifting through the mass of these petitions on federal judges, let alone Supreme Court justicies.[46]

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[44] 1973 SEMI-ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 20. The 1973 Semi-Annual Report discloses 8,072 prisoner petitions out of a total filings of 47,625 or 17.0 percent. *Id.* Figure 12. In the Fourth Circuit, 27.6 percent of all civil filings were prisoner petitions. Of 12,379 total appeals from district courts in fiscal 1972, there were 6,601 prisoner appeals (or direct criminal appeals on collateral review or civil rights actions), 53.3 percent of the entire appellate docket from district courts. *Id.* Figure 5.

[45] ADMINISTRATIVE OFFICE OF U.S. COURTS, FEDERAL JUDICIAL CENTER REPORT OF THE STUDY GROUP ON THE CASELOAD OF THE SUPREME COURT (1972) [hereinafter cited as FREUND COMMITTEE].

[46] *Id.* at 13.
While the deluge of prisoner petitions descends upon the federal courts, nothing is directed to the state courts, to the state judges who ordered incarceration in the first instance. And while state courts clearly have inherent power to require the establishment of administrative procedures to process prisoner complaints and to deal with legal problems generated by prison life, under recent case law it is the federal judge who must listen to state prisoner complaints. Even acknowledging the basic responsibilities of an Article III judge to be hospitable to constitutional claims, the federal judiciary's receptiveness to prisoners' civil rights claims no longer makes sense in view of the burgeoning federal case load.

Where a state had established a grievance procedure such as in Maryland, federal intrusion into the state penal system can only fire-up an already incendiary atmosphere.

For these reasons, it is this 17th day of May, 1974, Ordered:

1. That the defendants' Motion to Dismiss be, and the same hereby is, granted.

2. That the clerk of court is directed to mail copies of this Opinion to Charles F. Morgan, Esquire, attorney for plaintiff, and the Donald R. Stutman, Assistant Attorney General of Maryland.

In the United States District Court
For The District of Maryland

Civil No. 73-1182-B

James E. X. Stokes

v.

Gerald McClellan, etc., et al.

MEMORANDUM

Plaintiff, an inmate of the Maryland Penitentiary, had brought this action under 42 U.S.C. § 1983 against the Warden of the penitentiary, Gerald McClellan, and against the mail censor of the Maryland Department of Corrections. He seeks to enjoin an alleged violation of his constitutional rights. He also seeks compensatory damages. Leave to file in forma pauperis has previously been granted pursuant to 28 U.S.C. § 1915.

The complaint charges that certain literature that plaintiff has attempted to subscribe to had been

returned to the sender with "not approved" or "disapproved" affixed thereon. The publications in question are Akwesasne Notes, described by plaintiff as "a Native American newspaper", and the Gay Liberator.

The Attorney General of Maryland, as counsel for the defendants, has moved, *inter alia,* that the suit be dismissed on the authority of *McCray v. Burrell, et al.,* C.A. Nos. 72-68-N and 72-234-N, 367 F. Supp. 1191 (D. Md., Oct. 16, 1973), until such time as the plaintiffs have pursued the complaints giving rise to this suit through the inmate grievance procedure established pursuant to Art. 41, § 204(f), *Annotated Code of Maryland* (1972 Cum. Supp.).

This court is in complete accord with Chief Judge Northrop's opinion in *McCray, supra,* notwithstanding the fact that a part of the relief sought herein is damages for the deprivation of plaintiff's constitutional rights. *Smithson, et al. v. Boslow, et al.,* C.A. No. 73-1181-B (D. Md., Jan. 25, 1974). As a result, the court will dismiss the action without prejudice.

In so doing, the court and the parties will have the benefit of an orderly development of facts and issues through the grievance procedure. If the issues that relate to the injunctive relief that plaintiff seeks are therein resolved, he will then be free to assert his damage claim in this court.

Accordingly, the complaint will be dismissed without prejudice to allow the plaintiff to seek relief through the Inmate Grievance Commission. Upon completion of those procedures, he may institute a further action in this court if he is dissatisfied with the results achieved. An order will be entered separately.

C. STANLEY BLAIR,
United States District Judge.

Date: April 1, 1974.

ORDER

For the reasons set forth in a Memorandum of even date filed in this case, it is this 1st day of April, 1974, by the United States District Court for the District of Maryland ORDERED and ADJUDGED:

1. That the complaint is dismissed without prejudice to its reinstitution upon exhaustion of remedies available through the Maryland Inmate Grievance Commission pursuant to Article 41, § 204(f), *Annotated Code of Maryland* (1972 Cum. Supp.).

2. That the Clerk of the Court is directed to send a copy of this Order and a copy of the Memorandum to the plaintiff, the Attorney General of the State of Maryland, and the Inmate Grievance Commission.

C. STANLEY BLAIR,
United States District Judge.

United States Court of Appeals
For The Fourth Circuit

No. 74-1042

Milton McCray,
Appellant,
v.
Robert Burrell,
Appellee.

No. 74-1043

Milton McCray,
Appellant,
v.
Sergeant V. D. Smith (Badge No. 153)
Md. Penitentiary,
Appellee.

No. 74-1456

James E. X. Stokes,
Appellant,
v.
Gerald McClellan, individually and in his official capacity as Warden of the Maryland Penitentiary, and The Mail Censor, individually, and in his official capacity as mail censor of the Maryland Department of Corrections,
Appellees.

No. 74-1634

John Washington,
Appellant.
v.
Dr. Harold M. Boslow, Director, Patuxent Institution, and Dr. Domingo C. Sorongon, M.D., Patuxent Institution,
Appellees.

Appeals from the United States District Court for the District of Maryland, at Baltimore. Edward S. Northrop, Chief Judge, in Nos. 74-1042, 74-1043, and 74-1634; C. Stanley Blair, District Judge, in No. 74-1456.

Argued October 1, 1974 Decided April 10, 1975

Before Haynsworth, Chief Judge, Winter, Craven, Butzner, Russell, Field and Widener, sitting en banc.

Nos. 74-1042, 74-1043, 74-1456 and 74-1634. Charles F. Morgan, Prisoner Assistance Project, Legal Aid Bureau, Inc., (Michael S. Elder and Michael A. Millemann on brief) for Appellant in Nos. 74-1042, 74-1043, 74-1456 and 74-1634; Frank Wiggins, National Legal Aid and Defender Association, (Robert Plotkin, National Legal Aid and Defender Association, on brief) for Amicus Curiae in Nos. 74-1042, 74-1043, 74-1456 and 74-1634; (Barbara Gold, American Civil Liberties Union, Maryland Affiliate, on brief for Amicus Curiae); Donald R. Stutman, Assistant Attorney General of Maryland, (Francis Burch, Attorney General of Maryland, Clarence W. Sharp and Gilbert Rosenthal, Assistant Attorneys General of Maryland on brief) for Appellee in Nos. 74-1042, 74-1043, 74-1456 and 74-1634.

WINTER, Circuit Judge:

These appeals present the common question of whether a prisoner, incarcerated under state process, is required to exhaust available state remedies before the district court may or should exercise jurisdiction in a suit under 42 U.S.C. § 1983 for the redress of alleged deprivations of civil rights arising out of his incarceration. Some of these appeals were heard but not decided by a panel of the court. Because each presents the same question of exceptional importance, we consolidated them and heard them in banc.

In No. 74-1042 and No. 74-1043, plaintiff McCray, an inmate of the Maryland Penitentiary, sought relief under § 1983 for deprivations of liberty without due process of law and for imposition of cruel and unusual punishment arising out of two separate incidents in which he was allegedly placed naked in an isolation cell for a period of 48 hours. In No. 74-1042, he sought only compensatory and punitive damages. In No. 74-1043, his inartfully drawn *pro se* complaint may be read to seek injunctive relief as well as damages. Both cases were consolidated in the district court and tried nonjury. The district court dismissed both complaints with prejudice. The district court found that before suing under § 1983, McCray was required to exhaust the state administrative remedy established by the Maryland Inmate Grievance Commission Act, 4A Ann. Code of Md., Art. 41, § 204F (1973 Cum. Supp.), through which he could have obtained relief for the deprivation of his constitutional rights; and that since McCray had not exhausted his remedies under that statute he was not entitled to federal relief. McCray v. Burrell, 367 F.S. 1191 (D. Md. 1973). On the merits, it found that no constitutional violations had occurred in the incidents alleged; that each defendant, in the incident in which he was concerned, had acted in good faith reliance upon standard operating procedures and, hence, was immune from liability in damages.

In No. 74-1456, plaintiff Stokes, another inmate of the Maryland Penitentiary, filed a *pro se* civil rights

complaint in the district court alleging that prison officials had violated his first and fourteenth amendment rights by denying him permission to receive and read two national political newspapers, the Gay Liberator and Akwesasne Notes. He sought declaratory relief, injunctive relief and damages, both compensatory and punitive. On defendant's motion, the district court summarily dismissed the complaint for failure to exhaust the available state administrative remedy, relying on the alternative holding in the two *McCray* cases.

In No. 74-1634, plaintiff Washington, an inmate of the Maryland Patuxent Institution, filed a *pro se* complaint under 42 U.S.C. § 1983, alleging that he suffered injuries and deprivations of his constitutional rights as a result of the failure of a prison doctor to provide him with necessary medical care. He demanded a trial by jury, and he sought declaratory relief and compensatory and punitive damages. On the defendant's motion, his complaint was dismissed for failure to exhaust state administrative remedies. The ruling was more in the nature of a summary judgment because the district court received evidence concerning the adequacy of the administrative remedy under the Maryland Inmate Grievance Commission Act as a state administrative remedy for the purpose of exhaustion. The district court found that the Inmate Grievance Commission Act provided plaintiff with a fair and adequate remedy, notwithstanding the inability of the Commission to award damages in an appropriate case. Washington v. Boslow, 375 F.S. 1298 (D. Md. 1974).

We keenly appreciate the force of the factors identified by the district court in *McCray* and *Washington* as supporting a policy determination that exhaustion of available administrative remedies should be required of prisoners of correctional institutions in Maryland as a prerequisite to a suit under § 1983.

We recognize the burden which the increasing flood of prisoner complaint litigation places upon the already overtaxed district courts as well as ourselves. Neverthe-

less, we are constrained to conclude that the holding that exhaustion is required may be reached only by either legislation conditioning resort to 42 U.S.C. § 1983 upon the exhaustion of available administrative remedies, or by the Supreme Court's re-examination and modification of its controlling adjudications on the subject. Congress has not enacted such legislation. The Supreme Court has not yet begun a re-examination of its previous holdings and we have no basis on which to predict that it will, or, if so, with what result. We think that we have no alternative but to hold that exhaustion may not be required.

Accordingly, we reverse in Nos. 74-1456 and 74-1634 and remand the cases for determination on the merits. In Nos. 74-1042 and 74-1043, we reach the merits and conclude for reasons hereafter stated that reversal and remand for further proceedings are indicated there also.

I.

We consider first the question common to all four appeals — whether a prisoner must exhaust available state administrative remedies before a district court may exercise its jurisdiction under 28 U.S.C. § 1343 to adjudicate the merits of a claim under 42 U.S.C. § 1983 that there has been a deprivation of civil rights in prison treatment.

The doctrine of exhaustion of federal administrative remedies has broad application in the law. McKart v. United States, 395 U.S. 185, 193 (1969). Exhaustion of state administrative and judicial remedies is also a familiar doctrine. It is a part of the law of federal habeas corpus both by adjudication, *Ex parte* Hawk, 321 U.S. 114 (1944), and cases cited therein, and by statute, 28 U.S.C. § 2254(b).[1] Prior to enactment of the

[1] Although *Ex parte* Hawk, 321 U.S. 114 (1944), and 28 U.S.C. § 2254(b) treat directly only state judicial remedies, Preiser v. Rodriguez, 411 U.S. 475, 491-92 (1973), makes clear that exhaustion of state administrative remedies is also required before a federal court may entertain a habeas petition.

Johnson Act, 28 U.S.C. § 1342, when federal courts reviewed the reasonableness of state rate orders with some frequency, it was held that state judicial remedies must be exhausted before a railroad company could seek to enjoin the enforcement of a rate order of the Virginia State Corporation Commission in a district court. Prentis v. Atlantic Coast Line Co., 211 U.S. 210 (1908). Exhaustion of state administrative remedies is many times required as a prerequisite to suits against state officer. *See, e.g.*, Illinois Commerce Commission v. Thompson, 318 U.S. 675 (1943); First National Bank v. Board of County Commissioners, 264 U.S. 450 (1924).

Monroe v. Pape, 365 U.S. 167 (1961), is the seminal decision with respect to the need for exhaustion in actions brought under 42 U.S.C. § 1983. There, in a suit under § 1983 to redress shocking violations of fourth amendment rights, the claim was made that plaintiffs should have exhausted their state *judicial* remedies before suing in a federal court, but the argument was rejected:

> It is no answer that the State has a law which if enforced would give relief. The federal remedy [§ 1983] is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked. Hence the fact that Illinois by its constitution and laws outlaws unreasonable searches and seizures is no barrier to the present suit in the federal court. 365 U.S. at 183.

While Monroe v. Pape constituted no radical departure from the preexisting doctrine of exhaustion of state *judicial* remedies, it was applied two years later in McNeese v. Board of Education, 373 U.S. 668 (1963), as authority for the proposition that in suits under § 1983 there was also no need to exhaust state *administrative* remedies. In *McNeese*, plaintiffs sought to enjoin racial segregation in an Illinois public school system. The district court granted a motion to dismiss the complaint on the ground that plaintiffs had not exhausted the administrative remedies provided by Illinois law, and

the Court of Appeals affirmed on the same theory. In reversing, the Supreme Court called attention to its holding in Monroe v. Pape that one purpose of § 1983 was "to provide a remedy in the federal courts supplementary to any remedy any State might have." 373 U.S. at 672. Specifically, it said, "[i]t is immaterial whether respondents' conduct is legal or illegal as a matter of state law. Such claims are entitled to be adjudicated in the federal courts." 373 U.S. at 674 (citations omitted). It is true, as the district court noted, *McCray*, 367 F.S. at 1197, that following this holding the Court also expressed doubt that there was an adequate administrative remedy under Illinois law, and said, "[w]hen federal rights are subject to such tenuous protection, prior resort to a state proceeding is not necessary." 373 U.S. at 676 (citations omitted). This statement, however, seems nothing more than an alternative ground of decision, not a dilution of the first holding. Certainly it was so understood by Mr. Justice Harlan, the sole dissenter in *McNeese*, 373 U.S. at 676-82, who expressed as two separate grounds of dissent his views that the doctrine of exhaustion should not be abandoned in that case *and* that Illinois had an available, effective administrative remedy, which should be exhausted before suit was filed under § 1983.

If *McNeese*, as a result of the dual basis of decision, failed to resolve fully the question of prior exhaustion of administrative remedies in § 1983 suits. Damico v. California, 389 U.S. 416 (1967) (per curiam), should have put any remaining doubts to rest. There, the three-judge district court had dismissed a § 1983 complaint for failure to exhaust adequate administrative remedies. In its reversal, the Court cited *McNeese*, with an additional reference to Monroe v. Pape, for the holding that exhaustion of an available administrative remedy is not a prerequisite for an exercise of federal jurisdiction under § 1983. Again, Mr. Justice Harlan dissented, 389 U.S. at 417-20; noting that there could be no question about the adequacy of the state administrative remedy, he concluded that the Court had, in fact, decided the same issue which confronts us.

The next year, the Court again touched on the question before us. In Houghton v. Shafer, 392 U.S. 639 (1968) (per curiam), a district court's dismissal of a prisoner's § 1983 suit was reversed on the dual grounds that the available administrative remedy was not adequate and that exhaustion was not required. *Houghton's* principal importance lies in (a) the fact that it was a § 1983 suit by a state prisoner complaining of allegedly illegal prison restrictions, and (b) the interpretation given it in Wilwording v. Swenson, 404 U.S. 249 (1971) (per curiam). In the latter, the Court reversed the dismissal of applications for state habeas corpus for failure to exhaust administrative remedies. It was held that exhaustion was not required since the efficacy of the remedy was highly doubtful, but that, as another ground of decision, the applications for habeas, since they sought to attack living conditions and disciplinary measures in a penitentiary and not to effect petitioners' release, should be treated as complaints under § 1983. In § 1983 suits, the Court held exhaustion of state remedies was not required, and "[s]tate prisoners are not held to any stricter standard of exhaustion than other civil rights plaintiffs. Houghton v. Shafer. . . ." 404 U.S. at 251.

Carter v. Stanton, 405 U.S. 669 (1972) (per curiam), and Metcalf v. Swank, 406 U.S. 914 (1972) (mem. op.), are chronologically next in the line of authority. Both were § 1983 suits by welfare recipients. In *Carter*, a judgment dismissing the complaint for failure to exhaust a state administrative remedy was reversed on the ground that exhaustion was not required in this class of cases; and in *Metcalf*, the Court of Appeals was directed to reconsider, in the light of *Carter*, its affirmance (444 F.2d 1353 (7 Cir. 1971)) of the district court's dismissal of the suit for failure to exhaust adequate state administrative remedies.

In Steffel v. Thompson, 415 U.S. 472 (1974), Mr. Justice Brennan, writing for the Court, treated the law as settled in stating that "[w]hen federal claims are premised on 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3) — as they are here — we have not required exhaustion of

state judicial or administrative remedies, recognizing the paramount role Congress has assigned to the federal courts to protect constitutional rights." 415 U.S. at 472-73. Preiser v. Rodriguez, 411 U.S. 475 (1973), may also be significant, not so much for what it did say, but rather for what it did not say. In *Preiser*, the Court apparently had the opportunity to impose an exhaustion requirement on state prisoner suits under § 1983, and this it failed to do. The original Court of Appeals panel decision directed the prisoner, who had sought to redress his loss of good time as a result of prison discipline in a suit under § 1983 but whose suit was treated as a petition for a writ of habeas corpus, to exhaust state administrative or state judicial processes before he pursued further his claim to federal relief. Rodriguez v. McGinnis, 451 F.2d 730, 732-33 (2 Cir. 1971). In the Supreme Court, the case was decided on the basic premise that the complaint was to be treated as an application for a writ of habeas corpus, where exhaustion clearly applied. As Mr. Justice Brennan, in dissent, noted, "the Court does not graft the habeas corpus exhaustion requirement onto prisoner actions under the Ku Klux Klan Act. . . ." 411 U.S. at 503.

From this survey of the pertinent authorities, the law would appear overwhelming that exhaustion of available state administrative remedies is not a prerequisite to maintaining a § 1983 action in a federal court. We recognize, however, that the district courts in the instant cases and in Kochie v. Norton, 343 F.S. 956 (D. Conn. 1972) (dictum), have sought to read these cases to support the conclusion, as expressed in *Kochie*, that "[n]o decision of the Supreme Court squarely holds that the complaint of a state prisoner, which, if well-founded, is capable of prompt and complete redress by an administrative official, can be brought directly into a federal district court under § 1983 without any attempt at exhaustion of administrative remedies." 343 F.S. at 960. Without dissecting their analysis of how the apparent breadth of the language in each of the authorities cited is to be avoided, we are constrained to look at what support, if any, there is to conclude that

the Supreme Court has held, or will hold, that exhaustion in these circumstances will be required.

The only authority suggested by the state, but not vigorously pressed, to support the proposition that exhaustion may be required is Gibson v. Berryhill, 411 U.S. 564 (1973). That was a suit under § 1983 by licensed optometrists to enjoin the conduct of pending proceedings before the Alabama Board of Optometry, the object of which was to revoke their licenses to practice optometry because they practiced their art as employees of other persons or entities. Their principal complaint was that the Board was biased and could not provide them a fair hearing in accordance with the due process clause. A three-judge district court granted an injunction, but it was vacated by the Court and the case remanded for reconsideration in the light of an intervening Alabama Supreme Court case which held that a licensed optometrist was not prohibited by state law from accepting employment from a business corporation.

In reaching this result, the Court considered first the correctness of the district court's decision that it was not required to withhold relief until the license revocation proceedings had been concluded under the normal rule of exhaustion of administrative remedies. Dealing with this subject, the Court said:

> In the instant case the matter of exhaustion of administrative remedies need not detain us long. Normally when a State has instituted administrative proceedings against an individual who then seeks an injunction in federal court, the exhaustion doctrine would require the court to delay action until the administrative phase of the state proceedings is terminated, at least where coverage or liability is contested and administrative expertise, discretion, or factfinding is involved. But this Court has expressly held in recent years that state administrative remedies need not be exhausted where the federal court plaintiff states an other-

wise good cause of action under 42 USC § 1983 [42 USCS § 1983]. McNeese v. Board of Education, 373 US 668, 10 L. Ed. 2d 622, 83 S. Ct. 1433 (1963); Damico v. California, 389 US 416, 19 L. Ed. 2d 647, 88 S. Ct. 526 (1967). Whether this is invariably the case even where, as here, a license revocation proceeding has been brought by the State and is pending before one of its own agencies and where the individual charged is to be deprived of nothing until the completion of that proceeding, is a question we need not now decide; . . . (footnote eliminated) 411 U.S. at 574-75.

The Court then concluded, on this point, that since plaintiffs claimed that the administrative proceedings denied them due process of law, so that the remedy was ineffective, adjudication of this claim really required decision of plaintiffs' suit on its merits; therefore, exhaustion would not be required.

The possible significance of the Court's disposition of the exhaustion issue in this manner was pointed up by the separate concurring opinion of Justices Marshall and Brennan in which they joined the Court's opinion "except insofar as it suggests that the question remains open whether plaintiffs in some suits . . . [under § 1983] may have to exhaust administrative remedies." 411 U.S. at 581. They expressed the view that *McNeese, Houghton, Damico* and King v. Smith, 392 U.S. 309 (1968), had settled the question.

We do not think that *Gibson* provides a sufficient precedent to depart from the apparent scope and the literal language of the other Supreme Court cases. The majority opinion recognizes and does not purport to overrule *McNeese* and *Damico*. At most, the statement is a mere introduction to an alternative ground of decision; but, more importantly, it relates to facts quite dissimilar from those in the instant cases. *Gibson* proceeds on the premise that "the individual charged is to be deprived of nothing until the completion of [the state administrative] proceeding" (411 U.S. at 574-5) —

in short, in *Gibson* the possible harm was *in futuro*. *Gibson*, therefore, is unlike the instant cases where the alleged deprivation of civil right has occurred and may be continuing. Although decided before *Gibson*, Whitner v. Davis 410 F.2d 24, 28-29 (9 Cir. 1969), recognizes and supports this distinction, as does Toney v. Reagan, 467 F.2d 953, 956-57 (9 Cir. 1972), *cert. denied*, 409 U.S. 1130 (1973). *See also* Raper v. Lucey, 488 F.2d 748, 751 at n. 3 (1 Cir. 1973); Polk v. State Bar of Texas, 480 F.2d 998, 1003-04 (5 Cir. 1973); Stevenson v. Board of Education, 426 F.2d 1154, 1157 (5 Cir. 1970), *cert. denied*, 400 U.S. 957 (1970). The rationale of this distinction — which we need not adopt or reject to decide the cases before us — is that exhaustion may be necessary only when it assures that a decision of state officials depriving plaintiff of a civil right is final, so that the case is ripe for adjudication.

On balance, therefore, we have repeated expressions by the Supreme Court that exhaustion is not required in cases like the instant ones, and only an indirect expression that exhaustion may be required in certain cases unlike the instant ones. In this state of the law, it is inappropriate to consider the policy considerations which might dictate a different course of decision. They must be addressed to the Supreme Court, which alone can overrule its prior decisions, or to the Congress, which has authority to amend the statute. Our duty is clear: We must follow the Supreme Court, not attempt to lead it. We must hold that exhaustion is not required.

The plaintiffs argue also that the Maryland Inmate Grievance Commission Act does not provide an effective administrative remedy for their claims. They point out, for example, that the Secretary of Public Safety and Correctional Services is apparently neither bound by the record nor the findings and recommendations of the Inmate Grievance Commission in making final disposition of certain grievances, 4A Ann. Code of Md., Art. 41 § 204F(f)(2). An even more glaring omission in the Act, they argue, is its apparent failure to vest the Commission authority to award damages in an approp-

riate case. In the light of our conclusion on the exhaustion issue, however, we need not rule on the efficacy of the plaintiffs' administrative remedy.

Our conclusions require us to reverse in Nos. 74-1456 and 74-1634 and remand these cases for further proceedings. We turn to the merits in Nos. 74-1042 and 74-1043.

II.

McCray's suits against Sergeant Smith, a prison guard at the Maryland Penitentiary, and Captain Burrell, the duty captain in charge of all guards at the Maryland Penitentiary, who described himself as responsible for the entire institution including control and security (but not medical care) of the hospital, arose out of incidents occurring at those institutions on or about November 20, 1971, and January 1, 1972, respectively. The testimony with regard to both incidents was largely conflicting. The district court made extensive findings of fact, resolving questions of credibility, and we accept those findings. We disagree, however, with the legal conclusions to be drawn therefrom. The facts need not be restated in great detail in view of the district court's detailed recitations in its opinion. *See* McCray v. Burrell, 367 F.S. 1191, 1210 *et seq.*

A. *No. 74-1043 — McCray v. Smith*

On or about November 20, 1971, McCray was moved from his regular cell because of his complaints about unsanitary conditions. Sergeant Smith, who had never met McCray before, ordered his removal, had him showered and deloused and placed him in another cell on a different tier. The warden instructed Smith to provide McCray with his law books and legal materials which were kept in his regular cell. When they were not provided to him at once, McCray began a substantial vocal disturbance. Additionally, the screaming McCray tore a locker off the cell wall and banged it repeatedly against the wall.

Sergeant Smith determined that McCray should be removed from this cell and placed in the isolated confinement (I.C.) area, cell No. 5. As found by the district court, "this measure was taken to avoid the possibility of causing a greater disturbance among the other inmates." 367 F.S. at 1211. While McCray was being removed, again, as found by the district court, he "began shouting insults and threatening to do bodily harm to himself." *Id.* Smith, treating these threats as an indication of mental and emotional instability, directed that McCray be placed in isolated confinement without any clothes or bedding. This was done to protect McCray from harming himself.

McCray was placed nude in the cell about 11:30 a.m., November 20. The cell, itself, was quite long and narrow with a high ceiling. The walls, ceiling and floor were all concrete and there was a one-foot high concrete slab, six to eight feet long and three feet wide, which was McCray's bed. Although, initially, McCray was furnished no blankets or other bedding, during the night a prison guard gave him a mattress. McCray testified that it was so cold that he tore open the mattress, which was old and deteriorated, and dug a channel down in the cotton so that he could sleep nestled in the mattress. Subsequently, McCray was disciplined for destroying the mattress.

The cell contained a toilet and a sink. The record does not show whether the cell had a window, but evidence was offered that there was a light bulb recessed in the rear wall. The cell had two doors — the inner one composed of bars, and the outer one made of solid wood but not closed. McCray was given no materials with which to clean himself or the cell, and he was fed in plastic cups. He was deprived of reading and writing materials.

The next morning Sergeant Smith returned to check on McCray and found that he had defecated into a cup and smeared feces over himself and the cell wall. Accordingly, Smith decided not to return him to his former cell. Instead, he had McCray bathed and the cell

scrubbed, and then returned McCray to I.C. Cell No. 5 for another twenty-four hours. It was not until that time that Smith caused notice to be given to a psychologist or psychiatrist in accordance with the applicable written administrative directive which had become effective August 10, 1970. The directive stated that "an inmate who is displaying mentally disturbed behavior may be placed in an isolation cell for the inmate's own safety, or that of the inmate population, until the psychologist/psychistrist is notified . . ." and directed that the *"psychologist/psychiatrist should be contacted immediately after the confinement of the inmate, and the inmate should be evaluated within a twenty-four (24) hour period."* (Emphasis added.) By its terms, the directive permitted the placing of inmates displaying mentally disturbed behavior in a punitive or isolation cell when the institution lacks a mental observation cell and a psychologist or a psychiatrist approves the lodging of such an inmate in an isolation cell.

The next day, November 22, McCray, according to Smith, "started acting alright." He was then returned to his regular cell on the third tier. We infer that McCray's clothes were not returned to him until this time. The record on appeal does not show that he was ever evaluated by a psychologist or a psychiatrist.[2]

B. *No. 74-1042 — McCray v. Burrell*

On or about January 1, 1972, McCray was again removed to another cell. A fire broke out in McCray's cell, according to McCray, accidentally, but in the belief of Captain Burrell, by design. In either event, McCray was burned. Not without difficulty, the guards extinguished the fire and conveyed McCray to the dispensary where, despite McCray's resistance, the nurse on duty treated his burns. The nurse suggested that

[2] Sergeant Smith implied that the psychologist, one Dr. Musk, did see McCray. Dr. Musk testified that he could not report whether he had talked to McCray at this time. He said he would "most probably" have recorded such a visit, but often did not.

McCray remain in a locked cell in the hospital. At a later date, McCray was disciplined for setting fire to his cell.

Captain Burrell, who was present when McCray was treated, not unreasonably believed that McCray had set the fire. Since he concluded that McCray was mentally unstable, he decided, despite the nurse's suggestion, to place McCray in a mental observation (M.O.) cell, again without clothes or a mattress or other bedding. McCray was placed in the M.O. cell at about 9:45 a.m., January 1, and released about 8:00 a.m., January 3. At about the time he was treated in the dispensary, the nurse, purportedly acting in accordance with the written directive to which reference has been made, contacted a physician and informed him that McCray was placed in M.O. The physician told her to communicate with another doctor, whom she was unable to reach, and McCray was not seen by a physician until January 4, 1972.

The M.O. cell in which McCray was placed was described by Captain Burrell as a bare cell. The windows were covered with sheet metal, but the cell had an electric light. The cell had concrete walls, a concrete ceiling, and a tile floor. There was no sink, and the only sanitary facility was an "oriental toilet" — a hole in the floor, six to eight inches across, covered by a removable metal grate which was encrusted with the excrement of previous occupants. The "toilet" flushed automatically once every three to five minutes. McCray was not permitted to bathe, shave or have or use articles of personal hygiene, including toilet paper. He was not afforded reading or writing materials. He claimed that during the forty-six hours he spent in this confinement "it was impossible to sleep . . . I stood up most of that [first] night, the floor was cold."

III.

The district court held that plaintiff's confinement "in both cases for forty-eight hours was not an unreasonable period when one considers the surround-

ing circumstances in each case," 367 F.S. at 1215, and that "the defendant's actions were not excessive exercises of authority beyond the limits of civilized standards of decency . . . they [were not] intended as punishment for the plaintiff's conduct . . . they were employed as precautionary measures . . . the removals . . . to isolated cells were not pointless impositions of suffering . . . there [was not] a less severe alternative that would have achieved the purposes for which the confinement was imposed," 367 F.S. at 1216. While we accept the district court's findings that McCray's confinements in isolated cells were not intended as punishment but for mental observation and as a precaution against a not unreasonable fear that McCray might harm himself, we are constrained to conclude that McCray's eighth amendment right not to be subjected to "cruel and unusual punishments" was violated.

As articulated in Trop v. Dulles, 356 U.S. 86, 100-01 (1958), "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man," therefore the punishment imposed must be justified in light of the "evolving standards of decency that mark the progress of a maturing society." The eighth amendment is, of course, made applicable to the states through the fourteenth amendment. Furman v. Georgia, 408 U.S. 238 (1972); Louisiana ex rel. Francis v. Resweber, 329 U.S. 459 (1947).

It may be argued that, if the findings of the district court are accepted, McCray's claims do not raise eighth amendment questions, because McCray was isolated not for purposes of punishment but for the more humane and not unreasonable purpose of protecting him from self-harm, until an expert evaluation of his mental condition could be made and proper therapeutic steps taken if they were indicated. But the answer is that isolation of McCray occurred within a prison context. His jailers had the power to isolate him because he had been committed to their custody as punishment imposed pursuant to a judicial determination that he had engaged in criminal conduct. His confinement, in whole and in part, was punishment for his misdeeds. Thus, all of his confinement was subject to the restrictions of the eighth amendment. *Cf.* Howard v. Smyth, 365 F.2d 428, 429-30 (4 Cir. 1966), *cert. denied* 385 U.S. 988 (1966). If anything, the fact that McCray was isolated within the prison for nonpunitive purposes strengthens his case because special disciplinary reasons may not be offered in possible justification for the conditions in which he was kept.

A. In McCray's suit against Smith, we think that a violation of the eighth amendment has been shown.[3] The conditions of confinement in I.C. cell No. 5 came perilously close to a denial of eighth amendment rights in and of themselves, but the record is not sufficiently complete that we rest our decision on this ground. The cell did contain a toilet and a sink, although we do not know if either could be operated by McCray from within the cell or whether a guard was available to render them operative where their use was indicated. McCray was deprived of essential articles of hygiene, although conceivably there could have been a good faith belief that he might harm himself if permitted access to such seemingly innocuous articles as a bar of soap or a toothbrush. McCray was also deprived of heat, clothes

[3] We perceive that two tests for violations of the eighth amendment are relevant in the cases before us. First, are the conditions of punishment sufficiently "shocking" that they amount to "cruel and unusual" punishment? *See, e.g.*, Landman v. Royster, 354 F.S. 1302, 1318 (E.D. Va. 1973). Second, does the punishment constitute some rational means to reach a permissible end or is it, instead, arbitrary, Howard v. Smyth, 365 F.2d 428, 431 (4 Cir. 1966), unreasonable, Almond v. Kent, 459 F.2d 200, 204 (4 Cir. 1972), or unnecessary, Weems v. United States, 217 U.S. 349, 370 (1910)? The district court phrased this second test as requiring that there not be "a less severe alternative that would have achieved the purposes for which the confinement was imposed," 367 F.S. at 1216, and its phraseology does not seem inaccurate to us. *See also* Landman v. Royster, 333 F.S. 621, 645 (E.D. Va. 1971).

and blankets, and he was furnished only a deteriorated mattress in which he scooped out a resting place for himself. The record, however, does not disclose the temperature in McCray's cell or whether McCray was able to capture adequate sleep under these primitive conditions.

What is clear, however, is that if McCray's mental condition was reasonably believed to be so suspect as to justify the conditions we have described, then it was such as to warrant, if not the actual ministrations of professional personnel, an immediate effort to gain him prompt medical evaluation and necessary treatment. The written directive for operation of the place of confinement states specifically that when an "inmate who is displaying mentally disturbed behavior" is "placed in an isolation cell for the inmate's own safety, or that of the inmate population," the "psychologist/psychiatrist should be contacted *immediately* after confinement of the inmate, and the inmate should be evaluated within a twenty-four (24) hour period" (emphasis added). Evidently McCray was never examined during this confinement, but Sgt. Smith can hardly be held as a guarantor that the psychologist/psychiatrist whom he does not command will carry out his duties under the directive. Sgt. Smith, however, is accountable for his duty to notify, or to cause to be notified, the psychologist/psychiatrist *immediately* after McCray's isolation. By his own admission, Smith did not seek expert professional help until nearly twenty-four hours after he isolated and stripped McCray.

On this record, we conclude that McCray's conditions of confinement *per se* do not mount up to a denial of his rights under the eighth amendment. We have no doubt that a prisoner evidencing mental derangement in a form suggestive of self-harm or harm to others may and should be removed from the general prison population until his true condition can be assayed by those competent to evaluate him; and, until his examination and the formulation of an expert opinion, he may be

subjected to protective measures. In permitting such confinements, the prison directive comports with the eighth amendment. But, when the protective measures take the form of isolation, nude, in I.C. cell No. 5, we believe also that the administrative directive states the constitutional minimum in requiring that a "psychologist/psychiatrist . . . be contacted immediately after the confinement of the inmate, and the inmate . . . evaluated within a twenty-four (24) hour period." If compliance with the directive is not forthcoming, the guarantee of the eighth amendment has been denied, and, as we shall presently hold, if expert medical help is not forthcoming within a reasonable period of time, the deprivations, discomforts and suffering resulting from such confinement must be alleviated and less barbarous means of protection must be provided.

B. In McCray's suit against Burrell, we perceive two violations of the eighth amendment. First, the record reveals that the conditions of confinement in the mental observation (M.O.) cell in which McCray was kept fall far short of the current standards of decency of present-day society. McCray was kept naked in a barren cell without blanket or mattress and with nowhere to sit, lie or lean except against bare concrete or bare tile. He had no sink or running water; his only toilet was a hole in the floor, the cover of which was encrusted with human excrement. He was denied all articles of personal hygiene.[4] Society would hardly tolerate such confinement for a suspected mental patient, not convicted of crime; we cannot conceive that

[4] Many other cases have singled out the deprivations suffered by McCray in overall holdings that cell conditions violate the eighth amendment: unsanitary cell conditions and lack of items with which to clean oneself, LaReau v. MacDougall, 473 F.2d 974, 978 (2 Cir. 1972), *cert. denied*, 414 U.S. 878 (1973); inadequate heat, Wright v. McMann, 460 F.2d 126, 129 (2 Cir. 1972); Landman v. Peyton, 370 F.2d 135 (4 Cir. 1966); two and one-half days of isolated confinement, Knuckles v. Prasse, 302 F.S. 1036, 1062 (E.D. Pa. 1969), aff'd per curiam, 435 F.2d 1255 (3 Cir. 1970), *cert. denied*, 403 U.S. 936 (1971), *reh. denied*, 404 U.S. 877 (1971).

decent society would tolerate it even for a suspected mental patient who had been convicted of crime. The conditions of this confinement constitute a *per se* violation of the eighth amendment. *See* Landman v. Royster, 354 F.S. 1302 (E.D. Va. 1973); Landman v. Royster, 333 F.S. 621 (E.D. Va. 1971).

The second violation is identical to the violation in McCray's case against Smith — noncompliance with the constitutionally minimum requirements of the written directive concerning isolation of mentally disturbed inmates. As found by the district court, Captain Burrell took steps to comply with the institution's written directive to obtain promptly the services of an expert to evaluate McCray's condition at or about the time that he ordered McCray's special confinement. Like Sergeant Smith, Captain Burrell was not a guarantor that the expert attention would be immediately forthcoming, and it may well be that, as suggested by the district court, the directive was not fully carried out because McCray's second confinement occurred over the New Year's Day holiday. But Captain Burrell was not just a prison guard; he was captain of the guards. Even if we assume that the conditions of isolated confinement were constitutionally permissible, it was incumbent on Captain Burrell, if expert medical attention was not forthcoming in a reasonable period of time, to devise and employ means to protect McCray from injury to himself other than continued isolation with deprivation of clothing and elements of personal hygiene.

Although in the McCray cases we conclude that the treatment afforded McCray amounted to a denial of his rights under the eighth amendment, it does not necessarily follow that McCray is entitled to damages and injunctive relief against Smith or that he is entitled to an award of damages against Burrell. The district court held that "since the defendants, as shown from all the facts, acted in good faith in exercising their discretion . . . they are immune from suit under 42

U.S.C. § 1983." 367 F.S. at 1217. Although the cases must be remanded, we do not foreclose the possibility that both Smith and Burrell may again be held immune from damages.

Our prior decisions establish that when a prison guard acts in reliance on a good faith belief that what he is doing is constitutionally permissible, he is immune to damages as a consequence of his action even if it should be later established that his belief was ill-founded. Skinner v. Spellman, 480 F.2d 539 (4 Cir. 1973). *Cf.* Eslinger v. Thomas, 476 F.2d 225 (4 Cir. 1973); Hill v. Rowland, 474 F.2d 1374 (4 Cir. 1973). In applying the test, however, the district court seemed to conclude that because the defendants appeared to have complied with both the substance of the written directive with regard to the isolation of prisoners suspected of mental illness and the "normal operating procedure" of removing the clothing of "a prisoner who had exhibited an unstable mental and emotional state," 367 F.S. at 1217, immunity to damages followed as a matter of course. We do not perceive that the immunity doctrine may be applied in this fashion. Additional findings must be made before it may be properly concluded that defendants are immune, and it may be necessary to adduce additional evidence for those findings to be made.

Most important, defendants may not avail themselves of the defense until they have proved that they had a good faith belief in the legality of what they did. Since what is sought to be proved is a matter of defense, the burden of proof is upon them. In order to sustain that burden, we perceive certain subsidiary facts that must be established.

A. In the case of Smith, first, a satisfactory explanation must be offered of his directions that McCray be isolated in the I.C. area, rather than an M.O. cell. It is true that the written directive permitted a disturbed prisoner to be isolated in an I.C. cell in an institution which was lacking M.O. facilities, but it appears that

McCray's subsequent isolation by Burrell was in an M.O. cell, albeit one more primitive than the I.C. cell in which Smith placed McCray, so that it can be inferred that the Maryland penitentiary was not an institution lacking in M.O. facilities.

Second, the written directive, purportedly followed by Smith, explicitly stated that the "psychologist/psychiatrist should be contacted *immediately* after confinement of the inmate, and the inmate should be evaluated within a twenty-four (24) hour period" (emphasis added). As we have said, Smith cannot be held to the requirement of evaluation within twenty-four hours, but this provision gives meaning to the use of the word "immediately" in the preceding clause, and the record is clear that Smith took no steps to notify a psychologist or psychiatrist until the initial twenty-four hours of confinement had almost expired. In order to avail himself of the defense, it will therefore be incumbent on Smith to present proof which establishes by a preponderance of the evidence that the time within which he gave the notice complied with his reasonable understanding of the administrative direction of "immediately."[5] In this connection, the district court found that prison procedures required Smith to notify his superior immediately after isolating an inmate and that Smith was not shown to have failed to notify his superior. The district court misplaced the burden of proof. The immunity defense is for Smith to prove, not McCray to disprove.

B. In Burrell's case, we have held that the conditions of the M.O. cell in which McCray was confined were *per se* such as to violate the eighth amendment. But this is

[5] On remand the evidence may show that Smith discharged his duty by notifying a superior whom he reasonably expected would properly notify a psychologist or psychiatrist. Indeed, it may even appear that the superior gave such notice. In either event, if the proof further shows that standard operating procedures of the prison permitted this form of notification as compliance with the administrative directive, Smith could still be immunized from liability by the defense.

not to say that if Burrell had a good faith belief that he was acting legally in placing McCray in the M.O. cell, he was liable for damages for this violation. However, Burrell's good faith in this regard remains to be established if liability is to be avoided.

We have also held that the eighth amendment was violated when the administrative directive was not followed. But Burrell may not be responsible for this noncompliance. The district court must examine the scope of Burrell's duties and the extent of his responsibilities and determine that they were fully met before liability may be excused. This will include a consideration of the following, among others: Did Burrell have a continuing duty toward McCray after placing him in an M.O. cell? If so, did he have a duty to determine that a psychiatrist or psychologist had in fact been summoned? What duty, if any, did Burrell have when a psychiatrist or a psychologist failed to respond in a reasonable period? Were there other, more humane facilities to which McCray could have been transferred when a psychiatrist or psychologist failed to respond?

V.

Finally, we consider McCray's contention that he was improperly denied a jury trial in his suits against Smith and Burrell. We perceive no error.

McCray made no demand for a jury trial when he filed his *pro se* complaints on January 19, 1972, and February 9, 1972, in No. 74-1042, and on March 7, 1972, in No. 74-1043. Counsel was appointed to represent him in March 1972 and substitute counsel was appointed on or about December 8, 1972. The first request by McCray for a jury trial was made orally in open court on June 11, 1973.

McCray's request was both untimely and not in writing as required by Rule 38(b), F.R. Civ. P. As such, it constituted a waiver of trial by jury, Rule 38(d). Of course the district court had discretion to grant the

request, in whole or in part, notwithstanding, Rule 39(b), but we cannot say that there were such exceptional circumstances that the failure to grant the oral motion was an abuse of discretion. General Tire & Rubber Co. v. Watkins, 331 F.2d 192, 197-98 (4 Cir. 1964), *cert. denied*, 377 U.S. 952 (1964).

Accordingly, in Nos. 74-1042 and 74-1043, we reverse the judgments of the district court and remand the cases for further proceedings in accordance with the views expressed herein.

Reversed and remanded.

Addendum

Since the preparation of the majority opinion, the Supreme Court has decided Wood v. Strickland, ___ U.S. ___ (February 25, 1975), a case having relevance to Part IV of our opinion dealing with the defense of official immunity. *Wood* concerned the immunity of school officials to suits for damages under 42 U.S.C. § 1983 brought by students who claimed that they had been disciplined in violation of their constitutional rights. The holding that school officials are entitled to qualified immunity proceeded as an extension and application of Tenney v. Brandhove, 341 U.S. 367 (1951); Pierson v. Ray, 386 U.S. 547 (1967); and Scheuer v. Rhodes, 416 U.S. 232 (1974). The conditions under which immunity could be properly invoked were described as follows:

> The official must himself be acting sincerely and with a belief that he is doing right, but an act violating a student's constitutional rights can be no more justified by ignorance or disregard of settled, indisputable law on the part of one entrusted with supervision of students' daily lives than by the presence of actual malice. To be

> entitled to a special exemption from the categorical remedial language of § 1983 . . . a school board member . . . must be held to a standard of conduct based not only on permissible intentions, but also on knowledge of the basic, unquestioned constitutional rights of his charges. . . . [A] school board member is not immune for damages under § 1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with malicious intention to cause a deprivation of constitutional rights or other injury to the student. . . . A compensatory award will be appropriate only if the school board member has acted with such an impermissible motivation or with such disregard of the student's clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith. ___ U.S. at ___.

We think that what is said on the subject in the main opinion is consistent with *Wood*, and that *Wood* constitutes additional authority for the conclusions reached therein.

Field, Circuit Judge, concurring and dissenting:

While I cannot quarrel with the conclusion of the majority that on the present state of the law we have no alternative but to hold that exhaustion may not be required in a suit under 42 U.S.C. § 1983, in all deference, I cannot agree with its reversal of the district court on the merits of McCray's cases. To my mind this action of the majority is an incredible and unjustified judicial intrusion upon the right of the Maryland authorities to take reasonable disciplinary measures to maintain some semblance of order in their penal institutions, and arbitrarily discards the well docu-

mented decision of the district judge which was reached after a full and complete evidentiary hearing.[1]

It occurs to me that far from intruding upon the Eighth Amendment rights of McCray, Smith and Burrell conducted themselves in a reasonable manner and with admirable restraint under the circumstances. As the majority notes, the genesis of the Smith incident was McCray's request that he be moved from his regular cell because of its unsanitary condition. Sergeant Smith acceded to the request and had McCray showered and deloused and placed in another cell. When Smith did not immediately comply with McCray's imperious demand that his law books and legal materials be brought to his new cell, McCray created a substantial disturbance, screaming and tearing a locker off the wall and banging it repeatedly against the cell wall. It was then that Smith decided to remove McCray from the South Wing and place him in the isolated cell area, and the district judge specifically found that "[c]learly this measure was taken to avoid the possibility of causing a greater disturbance among the other inmates." Assuredly, this was not an unreasonable step on Smith's part nor was his

[1] The majority cites this court's opinion in Landman v. Peyton, 370 F.2d 135 (1966). In that case which involved the solitary confinement conditions in the Virginia State Penitentiary, the evidentiary hearing conducted by the district court disclosed, among other things, that the prisoners in such confinement subsisted on a diet of bread and water for two days, were deprived of all items for personal hygiene, and that the authorities resorted to the use of tear gas twelve to fifteen times in the course of a year. The district court concluded that all of this was done in the legitimate exercise of disciplinary authority. Writing for this court, Judge Sobeloff was highly critical of the Virginia authorities. However, he concluded that since the case came to us on conflicting testimony, we were not prepared to say that the findings of the district judge were clearly erroneous. It occurs to me that the findings and conclusions of Judge Northrop in the present case should be accorded similar respect.

decision to strip McCray and remove the mattress from the I.C. cell unreasonable in the light of McCray's shouted threats to do bodily harm to himself. On the following morning when Smith discovered that McCray had smeared himself and his cell with his own fecal matter, Smith did not leave him in this deplorable condition but dutifully had McCray showered and the cell scrubbed before returning him to the cell for another twenty-four hours. Under the circumstances, I hardly see how this or any other court could conclude that McCray had been treated in such a "base, inhuman and barbaric" manner that it violated his Eighth Amendment rights.[2]

In the Burrell case McCray had set his cell on fire, intentionally or otherwise, and thereafter used a metal cabinet to first break the sink and then the toilet in what the district court characterized as an "alleged effort to allow the water to flow more freely." The guards extinguished the fire and took McCray to the dispensary where his burns were treated by a nurse despite McCray's abusive resistance. Burrell, not unreasonably, viewed McCray's conduct as evidence of mental instability and, accordingly, placed him in a mental observation cell after removing his clothes and mattress to protect him from possible self-injury. As stated by the majority, McCray was allowed to remain in the M.O. cell for approximately forty-eight hours before being returned to his regular cell.

[2] With respect to the cell conditions the district court made the following observation:

> "The physical aspects of the cells in the isolated cell area and the mental observation area (which are substantially the same) are primitive at best. However, it is significant that the plaintiff candidly admitted on several occasions he had requested to be placed in the I.C. area because it was more conducive to preparation of legal papers. While it is true that he was fully clothed on these latter visits to I.C., it does indicate that the conditions of the cells were not intolerable." 367 F. Supp. at 1216.

Upon the evidence relative to these two incidents the district court specifically concluded that McCray had been placed in isolation "to avoid the possibility of continued disruptions that might involve substantial portions of the South Wing." The court further stated:

> "It is important to bear in mind that the Maryland Correctional System, like many others, has been plagued by considerable prisoner unrest. While this Court is not absolving the prisons of all responsibility for this problem, it is clear that a prison correctional officer must be concerned with avoiding situations which could ignite a riot. *This was the principal factor considered by the defendants in placing the plaintiff in an isolated cell.*" (Emphasis added) 367 F. Supp. at 1213-1214.

The district judge found that none of these events constituted an arbitrary and capricious punishment of McCray, and the majority concedes that he applied the appropriate criteria to the evidence when he observed:

> "The Court concludes that the defendants' actions were not excessive exercises of authority beyond the limits of civilized standards of decency. *See* Trop v. Dulles, 356 U.S. 86, 100-101. 78 S. Ct. 590, 2 L. Ed. 2d 630 (1958). Nor were they intended as punishment for the plaintiff's conduct, cut as has been repeatedly stated, they were employed as precautionary measures. The removals of the plaintiff from his cell on the South Wing to isolated cells were not pointless impositions of suffering, nor was there a less severe alternative that would have achieved the purposes for which the confinement was imposed. Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 2747, 33 L. Ed. 2d 346 (1972)." 367 F. Supp. at 1216.

To bolster its position in both cases, however, the majority has seized upon an institutional directive which stated that "an inmate who is displaying mentally disturbed behavior may be placed in an isolation cell for the inmate's own safety, or that of the

inmate population, until the psychologist/psychiatrist is notified * * *" and directed that the psychologist/psychiatrist should be contacted immediately after the confinement of the inmate, and the inmate should be evaluated within a twenty-four (24) hour period." Since, to some degree at least, the treatment accorded McCray was based upon the apprehension that he might be mentally disturbed, the majority concludes that the failure of Smith and Burrell to call expert medical help within the period prescribed by the directive in itself violated McCray's Eighth Amendment rights, and states that "if expert medical help is not forthcoming within a reasonable period of time, the deprivation, discomforts and suffering resulting from such confinement must be alleviated and less barbarous means of protection must be provided."

First of all, this somewhat novel constitutional pronouncement utterly ignores the finding of the district judge that the *principal* reason for McCray's isolation was to insulate the other inmates of the South Wing from the potentially dangerous and disruptive consequences of McCray's outrageous and flagrant misconduct, including what the district judge found was his attempt "to burn his cell and possibly the entire South Wing." Concededly, an agency must comply with its own regulations,[3] and had McCray sustained any injury as a result of the failure to provide timely medical care, arguably the directive might have furnished a basis for a negligence action by him.[4] The fact is, however, he required no such medical attention, and I am unaware of any constitutional principle which requires or justifies the incorporation of such an institutional directive into the Bill of Rights.

We are not dealing here with the arbitrary and pervasive pattern of conduct which Judge Merhige found in the Virginia penal system, *Landman v. Royster*, 354 F. Supp. 1302 (E.D. Va. 1973); *Landman v.*

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[3] *See*, United States v. Heffner, 420 F.2d 809 (4 Cir. 1969).

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[4] *See* Church v. Hegstrom, 416 F.2d 449 (2 Cir. 1969).

Royster, 333 F. Supp. 621 (E.D. Va. 1971); nor are the facts of this case at all similar to the prolonged confinement in the "strip cells" of Dannemora which confronted the Second Circuit in *Wright v. McMann*, 387 F.2d 519 (1967). There is not even a suggestion that McCray was being arbitrarily punished for attempting to exercise any of his constitutional rights, *cf. Howard v. Smyth*, 365 F.2d 428 (4 Cir. 1966). Regrettably, it appears to me that when the decision of the majority is read in the light of the record in this case, it is tantamount to a declaration that in this circuit the Eighth Amendment proscribes any substantial disciplinary action by prison authorities no matter how extreme and disruptive the misconduct of the inmate may be. In my opinion we would better serve the interests of justice and orderly prison administration by heeding the admonition of Judge Kaufman in *Sostre v. McGinnis*, 442 F.2d 178, 190-191 (2 Cir. 1971):

> "For a federal court, however, to place a punishment beyond the power of a state to impose on an inmate is a drastic interference with the state's free political and administrative processes. It is not only that we, trained as judges, lack expertise in prison administration. Even a lifetime of study in prison administration and several advanced degrees in the field would not qualify us *as a federal court* to command state officials to shun a policy that they have decided is suitable because to us the choice may seem unsound or *personally* repugnant." (Emphasis in original.)

McCray is no stranger to the district court of Maryland, having filed thirty-six suits in that forum in the three years prior to the cases here in question. Additionally, the records of our clerk reflect that fourteen appeals by McCray have been placed on the regular docket of this court during the past three years. The only conclusion that can reasonably be drawn from McCray's litigious history is that he is a chronic troublemaker and malcontent who is engaged "in a ceaseless barrage of frivolous civil suits at public

expense based upon allegations that have been repeatedly found meritless." *Daye v. Bounds*, (No. 74-1374, January 16, 1975, Slip. Op. p. 7). We can rest assured that if it accomplishes nothing else, the decision of the majority in these cases will encourage McCray and other prisoners of a similar disposition to flaunt prison authority, continue their disruptive conduct in the institution, and clog the docket of the district court with more frivolous litigation. In a prefatory observation in his opinion in these cases Judge Northrop noted that almost 31% of prisoner appeals filed nationwide were filed in the Fourth Circuit in fiscal 1972 and that this percentage increased to 36.1% during the first half of 1973. More importantly, he noted, such cases accounted for 38% of all cases filed with the Fourth Circuit in 1972 and for 45.3% for the first half of 1973. I discern something more than a mere coincidental correlation between these disturbing statistics and the philosophy of judicial lenity evidenced by the majority in these cases of McCray.

Judge Russell authorizes me to say that he joins in this opinion.

WIDENER, Circuit Judge, concurring and dissenting:

With deference to the majority, I agree with the opinion of Judge Field and I would add a few words.

I.

Although the majority opinion recites that it accepts the findings of fact of the district judge, it promptly discards the inferences made by him which are as much a part of his findings as the naked facts themselves. This I do not believe an appellate court has the authority to do, much less ought to do. FRCP 52(a); *Commissioner v. Duberstein*, 363 U.S. 278, 291 (1960); *United States v. Gypsum Company*, 333 U.S. 364, 394-95 (1948); *Piedmont Minerals Company v. United States*, 429 F.2d 560, 562 (4th Cir. 1970); *Glasscock v. United States*, 323 F.2d 589 (4th Cir. 1963); *Wilsey-Bennett Trucking Company v. Frost*, 275 F.2d 144, 147 (10th Cir. 1960).

II.

With respect to the question of exhaustion of administrative remedies, I concur in the result solely because of Part II of *Wilwording v. Swenson*, 404 U.S. 249 (1971), and not for the reasons given by the majority.

As the majority properly recognizes, *Monroe* dealt with state judicial, and not administrative, remedies. In *McNeese*, there was an administrative procedure but no real administrative remedy. As the court stated, "The Superintendent himself apparently has no power to order corrective action. In other words, his 'only function . . . is to investigate, recommend, and report. . . . [He] can give no remedy. . . .'" 373 U.S. at 675.

In *Damico*, the court apparently moved away from the more narrow ruling of *McNeese* and construed that case to hold that administrative remedies in suits under 42 U.S.C. § 1983 need not be exhausted although adequate. This ruling was underscored by *Houghton*, a prisoner's case in which the prisoner sought legal materials. The court noted, however, that it seemed likely that the administrative remedy was futile, and then, in an alternative holding, stated that resort to administrative remedies was unnecessary. 392 U.S. at 640. The matter stood here at the time of *Wilwording v. Swenson*, another prisoner's case challenging living conditions and disciplinary measures in 1971. Part II of that opinion took up the question of exhaustion in a prisoner's case brought under § 1983, and the court reaffirmed its holding in *Houghton* that in any event resort to administrative remedies was unnecessary. 404 U.S. 252.

But the *Houghton* decision was based on the reasoning that "state prisoners are not held to any stricter standard of exhaustion than other civil rights plaintiffs." 404 U.S. at 251. And the opinion noted the "probable futility" of administrative remedies in *Houghton*, 404 U.S. at 252.

Wolfe v. McDonnell, 42 L.W. 5190 (1974), however, held, rather than recited, that the rights of a state prisoner under § 1983 are not coextensive with those of any other person, and the court stated: "Of course, as we have indicated, that a prisoner retains rights under the due process clause in no way implies that this right is not subject to restrictions imposed by the nature of the regime to which he has been lawfully committed. . . . (citations omitted). Prisoner disciplinary proceedings are not part of a criminal prosecution and the full panoply of rights due a defendant in such proceedings does not apply. . . . (citations omitted). In sum, there must be mutual accommodation between institutional needs and objectives and the provisions of the Constitution that are of general application." 42 L.W. at 5195, 5196. The rule, as pointed out in the dissenting opinions, created a separate class for prisoners.

Further erosion of the absolute rule which some consider to have existed is shown by the concurring opinion of Mr. Justice Marshall in *Gibson v. Berryhill*, 411 U.S. 564 (1974), in which he stated that he joined the opinion of the court "except insofar as the suggestions that the question remains open whether plaintiffs in some suits brought under 42 U.S.C. § 1983 may have to exhaust administrative remedies." 411 U.S. at 581. *Gibson* was a suit under 42 U.S.C. § 1983 concerning the practice of optometry in Alabama, and the opinion of the court stated that whether exhaustion of administrative remedies in such a matter was "invariably the case" "is a question we need not now decide." 411 U.S. at 574, 575.

Thus, *Gibson v. Berryhill* may be read to *hold* that the question of exhaustion of administrative remedies is at least a partially open question.

Further erosion of the exhaustion rule is found in the very recent case of *Huffman v. Pursue*, 43 L.W. 4379 (March 18, 1975). That case held, in a suit brought in a district court to enjoin a common nuisance proceeding in a State court, where judgment had been entered in

the State court but the losing party had not appealed in the State system, rather going directly to the federal district court, that "a party in appellees posture must exhaust his state appellate remedies before seeking relief in the District Court, unless he can bring himself in one of the exceptions specified in *Younger.*" 43 L.W. at 4384. The importance of the ruling is that it shows definitely that the all embracing rule of non-exhaustion in all § 1983 cases is no longer the law, for this, and the holding in *Wolfe*, are direct holdings that, first, prisoners' rights are special cases, and, second, exhaustion may be required in some circumstances although the basis of the suit is under 42 U.S.C. § 1983. Indeed, the dissent of Mr. Justice Brennan in *Hoffman* describes the majority ruling as "an obvious first step toward discard of heretofore settled law that such actions may be maintained without first exhausting state judicial remedies." 43 L.W. at 4386.

Although not decided under 42 U.S.C. § 1983, *Schlesinger v. Councilman*, 43 L.W. 4432 (March 25, 1975), has further eroded the all embracing rule. It held that where a serviceman is charged with crimes by military authorities and could "show no harm other than that attendant to resolution of his case in the military court system, the federal district courts must refrain from intervention by way of injunction or otherwise." 43 L.W. at 4438, 4439. And the court concluded ". . . we discern nothing that outweighs the strong consideration favoring exhaustion of remedies or that warrants intruding on the integrity of military court processes." 43 L.W. at 4439. At p. 4438, the court had compared the policy rules of exhaustion in habeas corpus and non-intervention in State criminal proceedings with exhaustion of administrative remedies.

To this date, the Court has not been faced with a fact situation similar to the one at hand, that is to say, with a state statute providing an administrative remedy which, if not entirely adequate, is so nearly so that the deferral of only a small part of the relief sought would

not impinge on the rights of the plaintiff in any significant manner.

There is assuredly no policy reason for the courts not to apply the customary and general law of requiring exhaustion of administrative remedies merely because a case is brought under 42 U.S.C. § 1983. This is conclusively shown by the exhaustion doctrine developed with reference to habeas corpus cases. Surely, liberty is our most precious right, all others paling into insignificance beside it. And the protection of liberty in the last analysis is by writ of habeas corpus, which is specifically recognized in the Constitution and there protected from suspension except when in cases of rebellion or invasion the public safety may require it. *U. S. Constitution*, Article II, § 9. In the face of the liberty interest protected, for the sovereign in the last analysis may only impose his will on the citizen by confinement, the courts nevertheless developed an exhaustion requirement in habeas corpus cases as early as 1886 in *Ex parte Royall*, 117 U.S. 241 (1886), which was followed by a series of cases as late as *Ex parte Hawk*, 321 U.S. 144 (1944). The exhaustion doctrine was then codified in 1948 in 28 U.S.C. § 2254. Since no policy reason exists against exhaustion in protecting the liberty interest as shown by the decisions of the Supreme Court, I can find no policy interest which exists against an exhaustion requirement respecting conditions of confinement. If exhaustion is required to test the legality of the fact of confinement, what policy should require non-exhaustion when testing the conditions of confinement?

It follows that I would affirm other than on account of that part of Part II of *Wilwording* which has not been modified.

Judge Russell authorizes me to say that he joins in this opinion.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT VIII

Excessive bail shall not be required, nor excessive fines imposed nor cruel and unusual punishments inflicted.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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42 U.S.C. § 1983.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

ANNOTATED CODE OF MARYLAND

Article 41

§ 204F. Inmate Grievance Commission.

(a) *Commission established; appointment and terms of members; chairman; vacancies; compensation.* – The Inmate Grievance Commission is established as a

separate agency within the Department of Public Safety and Correctional Services. It shall consist of five members appointed by the Governor with the advice of the Secretary of Public Safety and Correctional Services. Of the five members so appointed, not less than two shall be lawyers qualified to practice law in the State of Maryland and not less than two members shall be persons of knowledge and experience in one or more of the fields under the jurisdiction of the Department of Public Safety and Correctional Services. Of the members initially appointed, two shall be for a term of four years, one shall be for a term of three years, one shall be for a term of two years and one shall be for a term of one year. Thereafter, all reappointments shall be for terms of four years. The Governor, with the advice of the Secretary of Public Safety and Correctional Services shall designate the chairman from time to time. The Governor, with the advice of the Secretary of Public Safety and Correctional Services, shall fill any vacancy which occurs before the expiration of a term for the balance of the term so remaining. Each member of the Commission shall receive per diem compensation as provided in the budget for each day actually engaged in the discharge of his official duties as well as reimbursement for all necessary and proper expenses.

(b) *Appointment and salary of executive director; investigative, secretarial and clerical employees.*—The Secretary of Public Safety and Correctional Services, with advice of the Commission, and with the approval of the Governor, shall appoint an executive director of the Commission who shall serve at the pleasure of the Secretary and who shall receive such salary as provided in the budget. In addition, the Secretary may provide the Commission with such investigative, secretarial and clerical employees as may be necessary for the efficient administration of the powers and duties of the Commission and as provided in the budget.

(c) *Removal of members.*—The Governor, upon the recommendation of the majority of the Commission or upon the recommendation of the Secretary, may remove

any member of the Commission for one or more of the following:

(1) Conviction of a crime involving moral turpitude or of any criminal offense the effect of which is to prevent or interfere with the performance of Commission duties.

(2) Failure to regularly attend meetings of the Commission.

(3) Failure to carry out duties assigned by the Commission or its chairman.

(4) Acceptance of another office or the conduct of other business conflicting with or tending to conflict with the performance of Commission duties.

(5) Any other ground which, under law, necessitates or justifies the removal of a State employee.

(d) *Submission of grievance or complaint.*—Any person confined to an institution within the Division of Correction, or otherwise in the custody of the Commissioner of Correction, or confined to the Patuxent Institution, who has any grievance or complaint against any officals or employees of the Division of Correction or the Patuxent Institution, may submit such grievance or complaint to the Inmate Grievance Commission within such time and in such manner as prescribed by regulations promulgated by the Commission. If, and to the extent that, the Division of Correction or the Patuxent Institution has a grievance or complaint procedure applicable to an inmate's particular grievance or complaint, and if the Inmate Grievance Commission deems such procedure reasonable and fair, the Commission may by regulations require that such procedure be exhausted prior to the submission of the grievance or complaint to the Commission.

(e) *Preliminary review.*—When a grievance or complaint is submitted to the Inmate Grievance Committee, the Commission, or any member thereof or the executive director, if so provided by the Commission's regulations, shall preliminarily review the grievance or

complaint. If upon such preliminary review the grievance or complaint is determined to be on its face wholly lacking in merit, it may be dismissed, by the reviewing commissioners or commissioner or executive director as the case may be, without a hearing or without specific findings of fact. Such order of dismissal shall be forwarded to the complainant within 60 days after submission of the grievance or complaint and shall constitute the final decision of the Secretary of Public Safety and Correctional Services for purposes of any judicial review.

(f) *Hearing and disposition by Commission; review by Secretary of Public Safety and Correctional Services.*—Whenever, after the preliminary review provided for the subsection (e), a grievance or complaint is not found to be on its face wholly lacking in merit, the Commission shall as promptly as practicable hold a hearing on the grievance or complaint. At least three members of the Commission shall sit at any hearing, and decisions shall be by a majority of those sitting. A record of the testimony presented at the hearing shall be kept according to the rules and regulations promulgated by the Commission. The Commission's decision shall be issued promptly after the hearing in the form of an order which shall include a statement of the findings of fact, the Commission's conclusions and its disposition of the complaint. The types of disposition shall be as follows:

(1) If after the hearing, the Commission finds in its order that the complaint is wholly lacking in merit and should be dismissed, such an order of dismissal shall be promptly forwarded to the complainant and shall constitute the final decision of the Secretary of Public Safety and Correctional Services for purposes of any judicial review.

(2) However, if after the hearing, the Commission in its order finds that the inmate's complaint was in whole or in part meritorious, such order shall be promptly forwarded to the Secretary of Public Safety and Correctional Services. Within fifteen days of the receipt of such an order, the Secretary by order shall affirm the

order of the Commission, or shall reverse or modify the order where he disagrees with the findings and conclusions of the Commission. The Secretary shall order that the appropriate official of the institution in question accept in whole or in part the recommendation of the Commission or the Secretary may take whatever action he deems appropriate in light of the Commission's findings. The order of the Secretary shall be promptly forwarded to the complainant, and the Secretary's order shall constitute the final decision for purposes of judicial review.

(g) *Access to documentary evidence; subpoenas; oaths and affirmations.*—The Commission, with the approval of the Secretary of Public Safety and Correctional Services, shall at all reasonable times have access to, for the purposes of examination, and the right to copy, any documentary evidence of any person or instituion being investigated or proceeded against and may require by subpoena the attendance and testimony of witnesses and the production of all documentary evidence of any person relating to any matter under investigation. The presiding commissioner at a hearing may administer oaths and affirmations.

(h) *Right of inmate to appear before Commission; opportunity to call witnesses; representation by counsel.* — The inmate shall have the right to appear before the Commission and shall have the opportunity to call a witness or a reasonable number of witnesses depending upon the circumstances and the nature of the complaint, subject to the discretion of the Commission as to the relevancy of the testimony and questions and the number of witnesses sought to be called. The inmate shall have a reasonable opportunity to question any witnesses who testify before the Commission. Such rights of the inmate shall not be unreasonably withheld or restricted by the Commission. If the inmate requests that he be represented at the hearing by an attorney of his own choosing he shall be permitted such representation at his own expense.

(i) *Record of complaints.* — A record shall be kept of all complaints and their disposition which shall be open to public inspection during regular business hours.

(j) *Conduct of hearings at certain institutions.* — For the performance of its duties, the Commission may conduct hearings at the institutions under the supervision and control of the Division of Correction or at the Patuxent Institution.

(k) *Rules and regulations.* — The Commission, subject to the approval of the Secretary, shall have the power to adopt rules and regulations for the conduct of its proceeding as provided for in this section.

(l) *Judicial review.* — No court shall be required to entertain an inmate's grievance or complaint within the jurisdiction of the Inmate Grievance Commission unless and until the complainant has exhausted the remedies as provided in this section. Upon the final decision of the Secretary of Public Safety and Correctional Services, the complainant shall be entitled to judicial review thereof. Proceedings for review shall be instituted in the circuit court of the county or in the Baltimore City Court, as the case may be, in which is located the institution where the complaint is confined. Review by the court shall be limited to a review of the record of the proceedings before the Commission and the Secretary's order, if any, pursuant to such proceedings. The court's review shall be limited to a determination of whether there was a violation of any right of the inmate protected by federal or State laws or constitutional requirements. (1971, ch. 210; 1973, ch. 588; 1974, ch. 160).